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19 UNITED STATES DISTRICT COURT

20 DISTRICT OF NEVADA

21 Cung Le, Nathan Quarry, Jon Fitch, Brandon
22 Vera, Luis Javier Vazquez, and Kyle
23 Kingsbury on behalf of themselves and all
23 others similarly situated,

Case No.: 2:15-cv-01045-RFB-(PAL)

24 Plaintiffs,
25 v.
26 Zuffa, LLC, d/b/a Ultimate Fighting
27 Championship and UFC,
28 Defendant.

JOINT STATUS REPORT

1 The parties in the above-captioned matter have met and conferred and submit the
 2 following Joint Status Report.

3 **I. Outstanding Motions (Joint Statement)**

4 There are no currently outstanding motions.

5 **II. Update on Pleadings (Joint Statement)**

6 On December 18, 2015, Plaintiffs filed their Consolidated Amended Complaint and
 7 reduced the number of named Plaintiffs from eleven to six. Dkt. 208. On January 19, 2016, Zuffa
 8 filed its Answer. Dkt. 212.

9 **III. Discovery Progress**

10 **A. Plaintiffs' Statement**

11 Plaintiffs have continued to diligently engage Zuffa in attempting to make progress in
 12 discovery. The parties have regularly participated in meet and confer teleconferences concerning
 13 both Plaintiffs' and Defendant's Requests for Production of Documents ("RFPs"). Since the last
 14 status conference on December 8, 2015, Defendant has produced only 17,909 documents,
 15 comprising primarily a set of Promotional and Ancillary Rights Agreements and contract
 16 extension and termination letters.

17 Plaintiffs provided the names of six additional custodians during a meet and confer
 18 teleconference on January 8 as well as the names of three replacement custodians who would
 19 replace three "agreed custodians" who do not have any custodial documents.

20 Plaintiffs have also worked to provide Zuffa with proposals to address Zuffa's claims of
 21 burden and objections as to the alleged overbreadth of certain of Plaintiffs' RFPs. Specifically, on
 22 December 18, 2015, and January 11, 2016, Plaintiffs sent letters to Zuffa proposing limitations on
 23 Plaintiffs' RFP Nos. 27, 33, 35 and 37, among others.¹ Defendant's responding letters of
 24 December 21, 2015 and January 13, 2016, respectively refused to discuss these proposals. *E.g.*,
 25 January 13, 2016 Letter from Cove to Dell'Angelo ("[T]his letter does not address everything

26 1 These letters also endeavored to obtain a response from Zuffa as to whether their objections had
 27 been resolved by the Court's various orders in the past few months for numerous RFPs including,
 28 *inter alia*, RFP Nos. 1-6, 16, 18, 41, 45, 48 and 59.

1 raised in your 11-page letter from January 11, 2016). When Plaintiffs' pressed these proposals on
 2 meet-and-confer calls, Zuffa refused to engage in a discussion of the proposals, instead stating
 3 that it would write us a letter with a response. No response has been forthcoming and requests for
 4 a date by which a response would be available have gone unanswered. Now, below, Zuffa
 5 "reserves its rights" as to these RFPs, a compromise position after Plaintiffs demanded that Zuffa
 6 retract a request that the RFPs be stricken as overbroad because Zuffa had not yet responded to
 7 Plaintiffs' proposals, which were over a month old.

8 Plaintiffs continue to remain open to meeting and conferring to resolve discovery disputes.
 9 The areas on which the parties have reached an impasse and require the Court's guidance are
 10 explained below.

11 **B. Zuffa's Statement**

12 The parties have been working diligently since the last status conference on December 8
 13 and continue to make progress in discovery.² The parties have regularly met and conferred
 14 regarding Plaintiffs' RFPs. Since December 8, Zuffa has produced an additional 17,909
 15 documents, totaling 239,923 pages, containing the production of the first tranche of Zuffa's
 16 electronic fighter files, which Plaintiffs identified as their top priority. Zuffa has made and
 17 continues to make substantial progress towards collecting and processing both centrally
 18 maintained and custodial files. After Plaintiffs identified the six additional custodians on January
 19 8, Zuffa arranged for its out-of-state vendor to complete the custodial collections and now
 20 anticipates that the collection of custodial ESI and hard copy documents for the 22 agreed-upon
 21 custodians will be complete within the next week. Zuffa has also made substantial progress in
 22 collecting non-custodial hard copy documents. At present, Zuffa is reviewing for production the
 23 hard copy fighter files for all athletes who have participated in a bout since December 16, 2010,
 24 which Plaintiffs identified as a priority. Zuffa is also prepared to make another production of
 25 documents relating to agreements with third parties shortly after a revised Protective Order
 26

27 ² Zuffa disagrees with the Plaintiffs' characterization of the meet and confer process as explained
 28 more fully in Section IV.B.2 below.

1 providing the higher designation of confidentiality requested by the third parties is in place.

2 Discussion of the Protective Order is included in Section IV.F below.

3 The parties continue to meet and confer and exchange information relating to Plaintiffs' 4 Responses to Zuffa's Requests for Production. The areas on which the parties have reached an 5 impasse and require the Court's guidance are explained below.

6 **IV. Current Discovery Disputes (Joint Statement)**

7 The parties have met and conferred on a wide range of issues. With respect to certain 8 issues, the parties are at an impasse. Specifically, the parties are at an impasse regarding the 9 following 5 issues:

- 10 1) Custodians: Whether Plaintiffs should be permitted to add 3 custodians to
11 replace Bryan Johnston, Sonja McKinney and Michael Pine.
- 12 2) Search Terms: Whether and to what extent search terms should be used.
- 13 3) Relevant Time Frame: What Relevant Time Period should apply to four of
14 Zuffa's Requests for Production.
- 15 4) Non-MMA Related Income/Compensation: Whether Plaintiffs should be
16 required to produce documents regarding income and compensation from
17 activities unrelated to Mixed Martial Arts.
- 18 5) Medical and Drug-Test Records: Whether Plaintiffs should be required to
19 produce documents relating to the reasons for any tolling or extension of their
20 contracts, including suspensions for the use of performance-enhancing drugs
21 or extensions for injuries.
- 22 6) Protective Order: Whether the Revised Protective Order should allow a
23 designation of "Highly Confidential – Attorneys' Eyes Only" for documents
24 of a medical or highly personal nature from the files of athletes.

1 **A. Custodians: Whether Plaintiffs Should Be Permitted to Add Additional**
 2 **Custodians to Replace 3 of the 16 “Agreed-Upon” Custodians: Bryan Johnson,**
 3 **Sonja McKinney and Michael Pine.**

4 **1. Plaintiffs’ Statement**

5 Plaintiffs propose to replace the three “agreed custodians”³ for whom Zuffa has recently
 6 informed Plaintiffs it has no documents whatsoever, but which Zuffa has refused to replace with
 7 custodians for whom it possesses documents. After the last Status and Dispute Resolution
 8 Conference held on December 8, 2015, Zuffa informed Plaintiffs that it has no documents or ESI
 9 for three of the parties’ “agreed” custodians: Bryan Johnston, Sonja McKinney and Michael Pine.
 10 Defendant’s rationale for refusing to replace the three “custodians” is that the Court ordered that
 11 the 16 previously identified “agreed custodians” must be included among the 22 custodians the
 12 Court authorized on December 8, 2015, without allowing for substitution or replacement. This
 13 position ignores the history of how the custodians at issue were identified (including the timing of
 14 information provided by Defendant). Further, Defendant’s position misrepresents that the Court
 15 has decided this issue—in fact, it was specifically deferred based on Zuffa’s statement that it was
 16 still searching for custodial data for some potential custodians.

17 Throughout the process of custodian selection, Zuffa has begrudgingly and selectively
 18 released information regarding its custodians (often after a case event or decision), forcing
 19 Plaintiffs to make decisions based on an incomplete picture of who Defendant’s employees are,
 20 what they did and what documents they have.⁴ Particularly prejudicial to Plaintiffs was the

21 ³ Reference to Zuffa’s custodians as “agreed” is a misnomer. The “agreed” custodians were those
 22 about whom the parties did not have a disagreement as to whether they were appropriate
 23 custodians, not about whom the parties had agreed for purposes of searching their documents as
 24 custodians. Initially, with respect to certain other custodians Plaintiffs proposed, Zuffa did not
 25 agree that they should be considered among the custodians among whom Plaintiffs could choose.

26 ⁴ It remains the case, as it was at the time of the December 8, 2015 Status Conference, Zuffa has
 27 not provided email or other document volumes that are limited by the Court-ordered relevant time
 28 period. Rather, Zuffa has instead provided undeduplicated email volumes that include attachment
 29 volume and several months of emails that are not subject to search or review to inflate the volume
 30 for purposes of claiming an “undue burden.” Similarly, Zuffa has not provided information on the
 31 devices in its possession, custody or control for some of the custodians, nor the volume of text
 32 messages or hard copy documents, if any.

1 sequencing of Zuffa's release of information regarding the potential custodians Johnston,
 2 McKinney, and Pine.

3 On September 8, 2015, Zuffa identified nine custodians,⁵ providing information on email
 4 volume for each on September 28, 2015. On October 20, 2015, following a review of Zuffa's
 5 organizational charts, Plaintiffs proposed 19 additional custodians, including Johnston, McKinney
 6 and Pine.⁶ In response, on October 28, 2015, Zuffa agreed to six of those additional custodians,
 7 including Johnston, McKinney and Pine.⁷ Shortly thereafter, Zuffa informed Plaintiffs that
 8 Johnston, McKinney and Pine's emails were destroyed pursuant to Zuffa's document retention
 9 policies. Defendant stated, however, that "ESI and hard copy documents found in shared drives
 10 and central files related to these individuals will be collected and reviewed for production." Nov.
 11 12, 2015 Letter from John Cove to Michael Dell'Angelo. Based on Zuffa's representation that
 12 documents and ESI existed for Johnston, McKinney and Pine, Plaintiffs continued to include
 13 them as "agreed" custodians in the discussions and correspondence. Following additional meet-
 14 and-confer teleconferences in late November and early December, Zuffa confirmed that it did not
 15 have documents for Johnston, McKinney and Pine in custodian-specific folders on Zuffa's
 16 network drive, at which point Plaintiffs questioned whether such "agreed" custodians should even
 17 be custodians at all. Dec. 2, 2015 Letter from Michael Dell'Angelo to John Cove. Defendant then
 18 confirmed on December 3, 2015, the eve of the last Joint Status Report, that it did not retain any
 19 devices or computers for McKinney, Johnston or Pine, but had not yet determined whether it
 20 possessed hard copy documents for the custodians. In response, Plaintiffs continued to question
 21

22 ⁵ Those custodians are Tracey Bleczinski, Peter Dropick, Lawrence Epstein, Lorenzo Fertitta,
 Reed Harris, Michael Mossholder, Sean Shelby, Joe Silva and Dana White.

23 ⁶ Plaintiffs also proposed Marshall Zelaznik, Marc Ratner, Jackie Poriadjian, Donna Marcolini,
 24 Craig Borsari and Nakisa Bidarian, the six additional custodians Plaintiffs have identified in
 response to this Court's Order at the December 8, 2015 Status Conference. Despite the three
 25 months that have passed since these custodians were proposed, Zuffa still has not provided
 information on the custodial documents for these six custodians including, *inter alia*, devices and
 26 hard copy documents Defendant has in its possession, custody or control for each custodian.

27 ⁷ Defendant also agreed to add John Mulkey, Defendant's (now former) Chief Financial Officer,
 Michael Mersch, Defendant's former Senior Vice President of Talent Relations, and Kirk
 28 Hendrick, Defendant's former Chief Operating Officer and current Chief Legal Officer.

1 whether they should be custodians at all, but asked Zuffa to confirm whether or not it was in
2 possession, custody or control of hard copy documents for McKinney, Johnston or Pine.

3 Immediately prior to the last Status Conference on December 8, 2015, counsel for Zuffa
4 approached Plaintiffs' counsel and proposed deferring the dispute as to those custodians who did
5 not have any documents or ESI on Defendant's email servers or in custodian-specific folders on
6 the network drive to allow Zuffa additional time to search for any hardcopy custodial files that
7 may exist for them, a proposal to which Plaintiffs agreed before the start of the Conference.
8 Defendant then raised this agreement with the Court at the outset of the Conference:

9 **Mr. Williams:** [W]ith respect to the, what I'll just characterize as the general list of
10 custodians. The plaintiffs had put in their status report that they believe it
11 would be reasonable for Zuffa to go ahead and perform searches for those
12 custodians that we've identified that our preliminary review demonstrates
13 that there are no ESI documents for them, there's no emails or custodian
14 specific files on the shared drive... [A]fter conferring with the client, we
15 are willing to perform that search. So to the extent that ... helps address the
16 issues regarding that category, I wanted to get that out there first.

17 **The Court:** So you're going to do a search to confirm that you really don't have
18 anything?

19 **Mr. Williams:** Well, that's right, Your Honor.

20 **Mr. Dell'Angelo:** [J]ust to put a little bit of context on there. Part of the issue, Your Honor,
21 was with respect to 13⁸ of the proposed custodians, Zuffa had reported
22 that there was no email or custodian specific folders. And what we had
23 suggested, and as I understand that Zuffa has agreed to do is, as we get into
24 the search for the rest of the custodians to just make a determination as to
25 whether or not there are other custodian specific files or folders that are
26 custodian folders or documents within the larger ESI set that they have...
27 And then separately, outside of ESI, whether or not, for example, there are
28 hard copied documents that may still exist at the facility ... over at
headquarters or something like that, or in some archive facility, to just kind
of close the loop on those individuals as custodians. That was our
recommendation and proposal and I think we have a general agreement on
that

29 Dec. 8, 2015 Status Conf. Tr., at 4:13-6:15.

30

⁸ The 13 custodians specifically include McKinney, Johnston and Pine.

1 After the Status Conference, on a December 22, 2015 meet-and-confer teleconference,
 2 Defendant informed Plaintiffs that no documents (including hard copy documents) or ESI of any
 3 kind had been retained for Johnston, McKinney or Pine. Thus, these “agreed custodians” are
 4 neither “agreed” nor “custodians” because they are not the custodians of a single document or
 5 piece of information, relevant or not. As a result, Plaintiffs propose to replace Johnston,
 6 McKinney or Pine with three different custodians from those whom Plaintiffs identified in the
 7 parties’ December 4, 2015 Joint Status Report, thereby maintaining the Court-ordered number of
 8 22 custodians. *See* Dec. 8, 2015 Status Conf. Tr., at 17:19-24.

9 Because three of the previously “agreed” “custodians” are not custodians of any
 10 documents or information, a fact that neither Plaintiffs nor the Court were fully aware of at the
 11 last Status Conference, Plaintiffs sought to replace those three with three custodians whom
 12 Plaintiffs understand have documents from the relevant time period.⁹ Zuffa refused, arguing that
 13 the Court had already ruled on this issue on December 8 and made an informed decision to
 14 include among Plaintiffs’ 22 custodians three custodians for whom the Court knew Zuffa had no
 15 documents or information. This belies Zuffa’s representation on December 8, 2015, prior to the
 16 Court’s ruling that the parties had agreed to defer the issue of the custodians who were believed to
 17 have no documents, including McKinney, Johnston and Pine. Now that Zuffa has provided
 18 Plaintiffs with the information promised at the December 8, 2015 Status Conference and
 19 confirmed that it has no documents or information for McKinney, Johnston and Pine, Plaintiffs
 20 should be permitted to substitute three alternative custodians from the list of custodians presented
 21 to the Court at the December 8, 2015 Status Conference.

22 **2. Zuffa’s Statement**

23 At the last status conference, after considering clear submissions from the parties on the
 24 documents available (or not available) from the agreed-upon custodians, the Court permitted the
 25

26 ⁹ Though it bears noting that Defendant has yet to confirm whether one of the proposed additional
 27 custodians, Chad Hurley, has documents from the relevant time period since Defendant appears to
 28 have excluded Mr. Hurley from its litigation hold. Plaintiffs have requested further information
 on Mr. Hurley but no information has been forthcoming.

1 Plaintiffs to choose an additional six custodians on top of the sixteen custodians already agreed-
 2 upon by the parties, for a total of twenty-two custodians. Dkt. 207. On January 8, Plaintiffs
 3 informed Zuffa of the six additional custodians they had chosen, and Zuffa is collecting and
 4 processing these custodians' documents and ESI. Plaintiffs now ask the court to revisit its ruling
 5 and order production from three more custodians in addition to the six the Court ordered, on the
 6 grounds that documents were not retained prior to the filing of the Complaint for three of the
 7 sixteen initially agreed-upon custodians, each of whom left Zuffa's employ before this litigation
 8 commenced. The record, however, could not be clearer that the parties had fully informed the
 9 Court of the situation with these three custodians' documents in the December status report and
 10 that the Court expressly acknowledged this fact before ordering the production from the
 11 additional six custodians. There is no reason to revisit the Court's prior ruling.

12 First, Plaintiffs made it clear in the last status report that three of the sixteen agreed-upon
 13 custodians at issue here had no documents, yet Plaintiffs specifically proposed that they still be
 14 included as custodians. Plaintiffs explained:

15 The parties have agreed on the identity of 16 custodians, 3 of whom, Defendant
 16 has indicated do not have any documents on its E-mail Server, any documents in
 17 custodian-specific folders on Defendant's Network Drive, or any retained devices.
 Plaintiffs propose including all 16 as custodians in this matter

18 Dkt. 206, Joint Status Report at 6. Second, Plaintiffs used the lack of documents from these three
 19 specific custodians as a basis to argue they should be entitled to additional custodians over the
 20 agreed-upon sixteen since the burden associated with including these three custodians was low.
 21 *Id.* at 6 n.12 ("Without identifying any discoverable material, there is no burden associated with
 22 including these three individuals as custodians"). Finally, the hearing transcript leaves no doubt
 23 that the Court fully understood the situation before ordering the six additional custodians:

24 If I get the gist, the parties have agreed on 16 custodians, however three of those
 25 have no emails or ESI and custodian specific folders. And the parties are at odds
 26 because Zuffa proposes that you perform a search and plaintiff make an election of
 two additional custodians. Plaintiffs want 44 additional or 44 total . . .

27 Dkt. 210, Dec. 8, 2015 Status Conf. Tr. 5:18-25.

1 Plaintiffs should not be permitted to add three more custodians simply because Zuffa
 2 agreed to and did conduct additional due diligence to, as the Court described, “confirm that you
 3 don’t really have anything” with regard to Pine, Johnston, and McKinney. Dkt. 210, Dec. 8, 2015
 4 Status Conf. Tr. 5:5-6. This is especially true because while no separate custodial files have been
 5 maintained for these custodians, responsive documents associated with these former employees
 6 will be produced. Zuffa has confirmed that the central contract files contain contracts and related
 7 documents signed and/or negotiated by Mssrs. Pine and Johnston that are being produced along
 8 with the other responsive documents in those files. Zuffa has also confirmed that responsive
 9 correspondence from Ms. McKinney is found in the fighter contract files and will be produced.

10 The Court’s previous Order was clear that the additional six custodians Plaintiffs were
 11 permitted to choose was on top of the sixteen already agreed-upon custodians, which included
 12 Pine, McKinney and Johnston. Dkt. 207 (“The Court will allow Plaintiffs to select an additional
 13 6 custodians beyond the agreed upon 16 custodians unless for good cause shown there is some
 14 essential person that has not been identified at this stage”). In coming to the determination that an
 15 additional six custodians was the appropriate number, the Court did so with the understanding of
 16 the burdens already associated with the agreed-upon sixteen custodians, a point made clear by
 17 Plaintiffs’ demonstrative at the last Status Conference which specifically laid out the volume of
 18 documents associated with each of the agreed-upon sixteen custodians. The Court never
 19 contemplated that Plaintiffs would get six additional custodians, plus the opportunity to swap out
 20 some of the agreed-upon sixteen custodians for three others.

21 Under the Court’s current Order regarding custodians, Zuffa will already collect well over
 22 a million emails¹⁰ and hundreds of thousands of non-email ESI and hard copy documents from
 23 the sixteen agreed-upon custodians and the six others Plaintiffs have chosen. There is simply no

24
 25 ¹⁰ Even before adding in the newly-designated six custodians, Zuffa has already collected and
 26 loaded (post-deduplication) over 1.2 million email documents from the initially agreed-upon
 27 sixteen custodians. While the specific final number of documents to review cannot be known
 28 until the additional six custodians’ documents finish loading and are de-duplicated across the
 universe of custodial documents and the June 30, 2015 cutoff date is applied, it is clear that the
 number will be substantial.

1 reason at this point in the process to revisit the Court's prior Order on this issue and add three
 2 additional custodians, especially since one of the three new custodians Plaintiffs seek to add is an
 3 attorney (Tim Bellamy) with over 135,000 emails¹¹ on the email server alone.¹²

4 **B. The Use of Search Terms**

5 **1. Plaintiffs' Statement**

6 Zuffa proposes to utilize an unreliable and patently under-inclusive list of proposed search
 7 terms to search for responsive documents in its non-custodial "central" files and all of its
 8 custodians' ESI.¹³ This is the rare case that does not warrant the use of search terms as a tool to
 9 further winnow the universe of discoverable documents proportional to the needs of the case. If
 10 search terms are to be used, Plaintiffs propose that the Court adopt Plaintiffs' far more reliable
 11 search terms which have been carefully tailored to the subject matter of the litigation.

12 As a preliminary matter, Defendant has already taken the unusual step of requesting that
 13 the Court rule on the number of custodians whose documents will be searched based on an
 14 overstated total volume of documents in the custodians' possession rather than the actual volume
 15 of responsive documents and information. That approach acknowledges that at least a very high
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17

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19 ¹¹ This figure is as of November 18, 2015 and the same caveat as discussed in footnote 8
 20 regarding the cutoff date applies.

21 ¹² In their footnotes 2 and 4, Plaintiffs complain that as Zuffa continues to collect documents,
 22 Zuffa has not provided interim de-duplicated and timeframe specific counts of the documents for
 23 the agreed-upon and the contested custodians or that Zuffa has not provided specific volume
 24 information regarding the additional six custodians that Plaintiffs chose on January 8. As Zuffa
 25 has previously explained, there is a substantial monetary and resource burden to collect, load and
 26 de-duplicate documents, and engaging in such an exercise before a final list of custodians is
 27 complete is inefficient, unnecessary and expensive. Within 10 days of Plaintiffs' provision of its
 28 final list of custodians, Zuffa coordinated for its counsel and its out-of-state vendor to be on-site
 to collect the remaining cell phone and computer data, as well as any hard copy documents from
 the new custodians, and is in the process of collecting the remaining custodial documents this
 week and next.

¹³ On December 21, 2015, for the first time, Zuffa sent Plaintiffs a list of search terms that it
 proposed to use to identify responsive documents from the majority of all sources of documents
 to be searched in response to Plaintiffs' Document Requests.

1 percentage of each custodian's documents will need to be reviewed.¹⁴ That stands to reason
 2 because, during the meet and confer process, Zuffa has taken the position that the allegations at
 3 issue cover virtually every aspect of its business. The Court should not permit Zuffa to first argue
 4 about the total volume of documents as a means to limit the number of custodians, and then argue
 5 that each custodian's document counts should be further reduced using Defendant's bare-bones
 6 search term proposal, particularly in light of the unique aspects impacting the search for
 7 documents in this case. To do so would prejudice Plaintiffs and calls into question whether the
 8 number of custodians permitted was far too small because the volume of documents responsive to
 9 the search terms pales in comparison to the scope and magnitude of the case.

10 Regardless, given the idiomatic nature of Zuffa's communications (discussed further
 11 below), a factor that even Zuffa did not appreciate or solve for when devising its proposed search
 12 terms, a set of search terms that will reliably identify responsive documents in this case is
 13 particularly difficult to devise. Given the finite volume of documents in this case, Plaintiffs
 14 propose that Zuffa should be required to conduct a linear review of its documents from non-
 15 custodial "central" files and all of its custodians' ESI.

16 In the alternative, Zuffa should be required to use Plaintiffs' more comprehensive and
 17 reliable list of search terms designed and targeted to capture a larger proportion of demonstrably
 18 relevant and responsive documents.¹⁵ Plaintiffs' search terms were carefully developed based on
 19 the allegations in the Complaint, the identities of the proposed class members, the individuals and

20 ¹⁴ Plaintiffs even proposed that, for certain custodians, search terms could be used but that, for a
 21 list of to-be-negotiated custodians, their entire set of documents would be reviewed linearly.
 22 Defendant summarily rejected Plaintiffs' proposal.

23 ¹⁵ Plaintiffs' proposed search terms are attached as Attachment A. Application of Plaintiffs'
 24 proposed search terms versus Zuffa's will not impose a greater burden on Zuffa in the search
 25 phase. The number of search terms is immaterial to the burden imposed because all search terms
 26 can be simultaneously entered and searched automatically. Although Plaintiffs' terms will likely
 27 yield more discoverable results, Plaintiffs' terms have been tailored to return relevant and
 28 responsive results. Ultimately, Plaintiffs' terms will result in a reduced burden on Zuffa and the
 Court because it will lessen disputes and the identification of potentially myriad nicknames and
 other idiomatic terms and expressions used by Zuffa that are not yet known to Plaintiffs. Plaintiffs
 further propose that, if search terms are to be used, Zuffa should be required to use Plaintiffs'
 search terms in conjunction with and in addition to whatever terms or methods were used by
 Zuffa to search for the documents produced to the FTC.

1 entities that form or relate to the allegations (to the extent known), and the idiomatic nature of
 2 Zuffa's communications (to the extent known). Plaintiffs also propose that if the Court does not
 3 require a linear review of documents, it should permit Plaintiffs to add additional unique search
 4 terms likely to yield discoverable documents and information, as those terms become known.

5 **a. Zuffa's Use of Idioms (Many of Which Cannot Be Known Without
 6 Discovery), and the Substantial Number of Relevant Names and Nicknames
 7 Warrant a Linear Review of the Small Subset of Zuffa's Total ESI That Will
 8 Be Searched.**

9 The application of search terms is not required by the Federal Rules nor appropriate in
 10 circumstances where, as here, the language that will lead to relevant documents is unpredictable
 11 and the volume substantial. Zuffa's custodians are prone to using idioms, most of the class
 12 members and many of the third parties are referred to by unusual nicknames and, given the high
 13 number of relevant names and terms, it is difficult to capture common or inadvertently misspelled
 14 instances of the terms and names. Therefore, the Court should require Zuffa to search for and
 15 identify responsive documents from Zuffa's limited number of custodians and central files
 16 without the use of search terms.

17 According to the Sedona Conference Best Practices Commentary on the Use of Search and
 18 Information Retrieval Methods in E-Discovery "Keyword searches work best when the legal
 19 inquiry is focused on finding particular documents and when the use of language is relatively
 20 predictable"; that is not so here. August 2014, at 232 ("Sedona Commentary"). Indeed, the
 21 Sedona Commentary recognizes that "simple keyword searching alone is inadequate in at least
 22 some discovery contexts." *Id.* at 233.¹⁶

23
 24
 25 ¹⁶ Zuffa argues that it attempted to apply Boolean and wildcard searches to address the
 26 shortcomings of simple keyword searches. However, of the 91 search terms that Zuffa proposed,
 27 approximately one-third are simple keywords. Zuffa's proposed Boolean and wildcard searches,
 28 are designed to further restrict the scope of documents and operate much as a simple keyword
 search. For example, Zuffa proposes many searches such as "Robert w/2 Roveta". Thus, any
 document that only refers to Robert Roveta as "Roveta" will not be returned as a result.

1 The inadequacy of Zuffa's search terms is due to at least two factors, which can only be
 2 remedied to a limited extent with Plaintiffs' proposed search terms, and their inadequacy
 3 demonstrates why this case does not lend itself well to the application of search terms.

4 First, Zuffa's proposed search terms are highly under-inclusive in several obvious and
 5 important ways. Zuffa's proposed terms exclude the names of virtually all of the 950 fighters in
 6 the proposed class¹⁷ as well as most managers, agents, sponsors, merchandisers, venues,
 7 promoters and other key names that directly relate to (and in many instances are expressly
 8 included in)¹⁸ the allegations in the Consolidated Amended Complaint.¹⁹ The Sedona
 9 Commentary observes that search terms present unique problems when applied to common
 10 names, such as the first names of fighters, agents and managers (of which there well over 1,000 in
 11 this case). The Sedona Commentary states that “[k]eyword searches can also exclude common or
 12 inadvertently misspelled instances of the term (e.g., “Phillip” for “Philip,” or “strik” for “strike”)
 13 or variations on “stems” of words (e.g., “striking”).” Sedona Commentary, at 233. Zuffa has

14
 15 ¹⁷ Ironically, despite Plaintiffs' view that medical records and drug test results for all 950 fighters
 16 are not relevant, Zuffa continues to insist upon producing them but claims that inclusion of the
 17 names of “all fighters [i.e., the members of the proposed class], however, is far too overbroad.”

18 For example, Defendant's proposed terms omit fighters B.J. Penn, Randy Couture, Quinton
 19 “Rampage” Jackson, and Fedor Emelianenko, each of whom are alleged victims of specific
 20 threats and anticompetitive conduct in the Consolidated Amended Complaint (“CAC”). E.g.,
 21 CAC ¶ 118 (discussing Dana White threatening Penn when he informed the UFC he planned to
 22 sign with another promotion company); *id.* ¶ 119 (discussing the UFC punishing Couture when
 23 he refused to assign ancillary rights); *id.* ¶ 123 (discussing the UFC blocking Jackson's deal with
 24 Round 5 for developing an action figure); *id.* ¶ 130(b) (discussing the UFC blocking a lucrative
 25 fight between Randy Couture and Fedor Emelianenko). Defendant's proposed terms also exclude
 26 promoters and/or the names of individuals who ran the promotions. E.g., *id.* ¶ 129 (discussing the
 27 World Fighting Alliance (“WFA”)); *id.* ¶ 130(a) (discussing promotion run by Oscar de la Hoya);
 28 *id.* ¶ 130(b) (discussing HDNet Fights and founder Mark Cuban); *id.* ¶ 141 (discussing Japanese
 1 promotion Dream which had co-promotional arrangements with Strikeforce prior to the UFC's
 2 acquisition). Nor do Defendant's proposed terms include terms targeted to collect materials
 3 related to the various broadcasters named in the CAC, including CBS and Showtime (*id.* ¶¶ 131
 4 & 142), AXS TV and HDNet (*id.* ¶¶ 141 & 143), or “Fight Pass” (*id.* ¶ 144). Defendant's
 5 proposed terms also exclude the names of sponsors specifically discussed in the CAC. E.g., *id.* ¶
 6 123 (discussing Jackson and the UFC's dealings with Round 5). These failings are just examples
 7 of the deficiencies of Defendant's proposed terms.

8 ¹⁹ The inclusion of the names of some, but not all, fighters, promoters and agents is a tacit
 9 admission that the names of these individuals and entities are appropriate search terms.

1 objected strenuously to the inclusion of common names in Plaintiffs' search terms and Plaintiffs'
 2 removed many of them from its current proposal. Inclusion or exclusion of common names will
 3 cause relevant documents to be unnecessarily missed during Zuffa's review. Thus, given that
 4 there are over 1,000 common names alone that will lead to relevant documents, a linear review is
 5 a far more reliable means of identifying documents in this case.

6 Even to the extent Zuffa includes the names of certain individuals and entities, many of
 7 the proposed class members are known as much, if not more so, by their given names as by their
 8 nicknames. For example, class representative Nate Quarry is known and often referred to in the
 9 MMA industry as "Rock". *See, i.e.*, https://en.wikipedia.org/wiki/Nate_Quarry. Quinton Jackson,
 10 a popular UFC fighter is often referred to as "Rampage" or "Rampage Jackson." *See, i.e.*,
 11 <http://www.ufc.com/fighter/Quinton-Jackson?id=>. Zuffa's proposed search terms do not include a
 12 single fighter nickname. Notably too, Zuffa's proposed search terms exclude names of many
 13 managers and agents from whom Zuffa insisted Plaintiffs collect documents, many third parties to
 14 whom Zuffa has issued subpoenas, and individuals and entities identified in the parties' Initial
 15 Disclosures.²⁰ Even those names Zuffa includes are unnecessarily narrow. For example, Zuffa
 16 requires agents' full names to be used (*e.g.*, "Rico w/2 Chiapparelli") thereby excluding any
 17 reference to the agents that only uses the first or last name (much less a nickname). Similarly,
 18 Zuffa's terms for rival promoters are overly-restrictive and not designed to capture responsive
 19 documents. For example, although the promotion known as "M-1 Global" is frequently referred
 20 to in the industry and colloquially only as "M1"²¹ or "M-1," such references would not be found
 21

22 ²⁰ For example, Defendant sent a preservation letter to DeWayne Zinkin (as did Plaintiffs and
 23 Plaintiffs also served a subpoena on Zinkin's management agency, Zinkin Entertainment), who
 24 represented named Plaintiff Jon Fitch. But Defendant's search terms are not targeted to collect
 25 documents related to Mr. Zinkin or his management agency. Additionally, Plaintiffs served
 26 subpoenas on numerous other third parties who are not accounted for in Defendant's terms
 27 including, *inter alia*, Kurt Otto and Gareb Shamus (former executives with the International Fight
 28 League), Bob Meyrowitz (former head of the UFC before it was acquired by Zuffa), Jeremy
 Lappen (former principal of EliteXC who also worked with the WFA), and numerous agents and
 managers.

²¹ In addition to the colloquial use, M1 employees used email addresses provided by gmail.com
 following the protocol FirstName.Lastname.M1@gmail.com. *E.g.*, ZUF-00452074 (email

1 using Zuffa's proposed term. Plaintiffs have attempted to remedy Zuffa's failure to add key
 2 names and its use of overly-restrictive terms by compiling lists and adding them to Plaintiffs' list
 3 of proposed search terms. Importantly, Plaintiffs' list of proposed search terms removes these
 4 overly restrictive limits Zuffa imposes without using ubiquitous and common terms that would
 5 generate a substantial number of non-responsive results. Thus, Plaintiffs' proposed list is targeted
 6 to collect responsive materials and not impose an undue burden on Zuffa.

7 Second, a review of the Federal Trade Commission ("FTC") production reveals that
 8 Zuffa's internal correspondence is highly idiomatic and, as such, is not susceptible to reliable
 9 searching with search terms. The Sedona Commentary observes that "if authors of records are
 10 inventing words 'on the fly,' as they have done through history, and now are doing with
 11 increasing frequency in electronic communications, such problems are compounded." Sedona
 12 Commentary, at 233. That is precisely the problem here.

13 For example, a potential competitor, Affliction Entertainment, appears numerous times in
 14 Plaintiffs' Consolidated Amended Complaint as one that Zuffa put out of business as part of its
 15 anticompetitive scheme. *See, e.g.*, CAC ¶¶ 12, 130(a) and 150. Yet, in the FTC documents
 16 produced, Zuffa executives frequently referred to executives Tom Atencio and Todd Beard of
 17 Affliction as "T-shirt Guy" rather than their given names. *See, e.g.*, ZUF-00153990 (email
 18 discussing Affliction with the subject line: "Message from T-Shirt Guy"). Similarly, allegations
 19 regarding another potential rival, Strikeforce, feature prominently in the CAC (*e.g.*, CAC ¶¶ 128,
 20 131-134 & 150) and prompted the FTC's investigation of Zuffa, resulting in Zuffa's production
 21 of documents to the FTC which Zuffa produced to Plaintiffs in this case.²² In the FTC
 22 Production, Zuffa executives refer to Strikeforce, as "Strikefarce" or "strike farce". *See, e.g.*,
 23 ZUF-00342599 (email from Lorenzo Fertitta to John Mulkey stating "...is giving strikefarce our
 24 financials"); ZUF-00342725 (email from Lorenzo Fertitta stating "I hear strike farce april is going

25 exchange between Strikeforce employee and M1 employee that does not include "M1 Global" as
 26 a term). Thus, emails between Zuffa (or predecessor entities) and M1 employees could be
 27 improperly and unnecessarily excluded by Zuffa's proposed terms.

28 ²² The Sedona Conference identifies "strike" as a prime example of an "inadvertently misspelled
 instances of the term (*e.g.*, ... "strik" for "strike")." Sedona Commentary, at 233.

1 to be at thomas and mack in vegas.”); ZUF-00338841 (email from Bryan Johnston to Lorenzo
 2 Fertitta and Dana White stating “In case it comes up when you clip strikefarce....”). Notably,
 3 despite Plaintiffs’ requests at the outset of the meet-and-confer process, Zuffa has refused to
 4 disclose whether it used search terms to identify documents produced to the FTC, the search
 5 terms used, if any, and which custodians and central files were searched. Other examples of such
 6 terms and slang abound. Although the idiomatic language used by Zuffa’s officers and employees
 7 weighs heavily in favor of not using search terms at all, at a minimum, such language requires a
 8 broad range of search terms that seek to cover the various terms and permutations that are used as
 9 well as using alternative methods (such as including names and nicknames of the various
 10 categories of individuals and entities such as fighter-class members, agents, sponsors, venues and
 11 promoters) to capture responsive documents that traditional subject-matter-based search terms
 12 miss.

13 Zuffa argues that search terms are necessary because some of Plaintiffs’ requests “call[]
 14 for essentially all documents relating to any communication with or about any fighter, any of his
 15 or her representatives, and any actual or potential venue, sponsor, merchandiser, retailer or TV
 16 distributor.” That too is misleading. Plaintiffs have expended considerable effort during the meet-
 17 and-confer process to narrow the scope of their Requests to address just that very concern.
 18 Indeed, in December and early January, Plaintiffs again proposed ways to narrow many of the
 19 Requests (both those calling for “all documents” and more narrow requests). *See, e.g.*, December
 20 18, 2015 and January 11, 2016 letters from M. Dell’Angelo to J. Cove. However, Zuffa has not
 21 yet responded to many of Plaintiffs’ proposals and declined to say when they would do so. Thus,
 22 there is no basis to claim that search terms are necessary to address overbroad requests.²³

23 Regardless, the breadth of the requests has little bearing on whether search terms should be
 24 used to search custodial files. Plaintiffs’ discovery requests are tailored to identify documents and
 25 information that are relevant to the parties’ claims and defenses and proportional to the needs of
 26 the case. That some of the requests may be viewed as broad is indicative of the scope of the case,
 27 not the relevance of the material requested. Because the requests are properly targeted, the fact
 28 that the requests may be viewed as broad only means that a higher percentage of documents are
 responsive. Thus, the narrowing of the number of custodians and the targeting of custodians who
 are likely to have a higher percentage of responsive documents already accounts for the necessary

1 Zuffa's arguments regarding the propriety of search terms are misleading and not well-
 2 founded. First, in seeking to narrow the scope of discovery in this case, Zuffa has represented to
 3 the Court that it possesses over 3 petabytes of ESI. By limiting the universe of documents that
 4 will be searched to just 19 custodians and a handful of central files, the total universe of ESI at
 5 issue has necessarily been reduced to some number of gigabytes.²⁴ Zuffa argues below that the
 6 universe will be reduced to approximately 1 million documents. However, as it has done
 7 consistently, Zuffa has provided overstated document counts or estimates. Zuffa's document
 8 count, for example, does not account for the application of search terms, deduplication of *all* of
 9 the custodians' documents, email threading, limitation to documents during the relevant time
 10 period, the application of filtering techniques to reduce the volume of the legal custodians'
 11 potentially privileged documents, De-NISTing, or any other preproduction filtering techniques.
 12 Collectively, these methods will further significantly reduce the total number of documents in the
 13 custodial files before any search terms are applied.

14 Plaintiffs propose that search terms are not an appropriate discovery tool in light of the
 15 unique circumstances of this case, which include a vast number of proper names, entity names,
 16 nicknames and idioms. If, however, the search terms are to be used, Plaintiffs propose that Zuffa
 17 should be required to utilize Plaintiffs' search terms which are proportional to the needs of the
 18 case and to be applied to a fraction of Zuffa's ESI.

19
 20
 21
 22 discovery efficiencies. Zuffa also claims that certain requests are overbroad because they will
 23 return irrelevant documents related to the everyday administrative tasks in connection with events
 24 (*e.g.*, production schedules). To the extent this objection has not been remedied through custodian
 25 selection (and Zuffa has offered no information or basis for believing it has not), it can be
 26 addressed by applying search terms to those specific custodians, as Plaintiffs previously
 27 proposed.

28 ²⁴ Because 1 petabyte is equal to 1,000,000 gigabytes, the custodian selection process has already
 29 ensured that much less than 0.1% of Zuffa's data being subject to search and production. Given
 30 that this case challenges Zuffa's business practices in nearly all areas of its business, such a
 31 limited production should not be further limited by unnecessarily narrow search terms.

b. Plaintiffs' Proposed Search Terms Are Reliable, Tailored to The Allegations and Needs of the Case and Vastly Superior to Zuffa's Proposal.

At a minimum, the adoption of Plaintiffs' search terms are necessary to reduce the obvious shortcomings of Defendant's proposed search terms.

The Sedona Conference expressly recognizes that “while basic keyword searching techniques have been widely accepted both by courts and parties as sufficient to define the scope of their obligation to perform a search for responsive documents, the experience of many litigators is that simple keyword searching alone is inadequate in at least some discovery contexts.” Sedona Commentary, at 233-34. The inadequacy of Defendant’s proposed terms is demonstrable. As the Court is aware, in response to Plaintiffs’ Request No. 54, on November 2, 2015, Zuffa produced 107,649 documents to Plaintiffs which Zuffa had previously produced to the FTC in connection with the FTC’s investigation of Zuffa in 2012 (the “FTC Production”).²⁵ To test the reliability of Zuffa’s search terms, Plaintiffs used Zuffa’s search terms to search the FTC Production; the results are telling. When Zuffa’s proposed search terms were applied to the FTC Production, the search terms returned only 52.86% or 56,902 of 107,649 documents contained in the production. In addition to the FTC Production, Zuffa has produced 18,641 additional documents for a total of 126,290 documents. Plaintiffs also tested the reliability of Zuffa’s search terms against the entire production of documents; again, the results were poor. When Zuffa’s proposed search terms were applied to Zuffa’s entire production to date, the search terms returned only 57.41% or 72,506 of 126,290 documents. Therefore, under the best case scenario, Zuffa’s proposed search terms *exclude 47.14%* of the documents that it produced in response to the FTC’s investigation of Zuffa and 42.58% of all of the documents that Zuffa has produced to date. By contrast, Plaintiffs’ proposed search terms return 91.18% or 98,797 of 107,649 documents contained in the FTC Production.

²⁵ The FTC investigation has clear parallels to this case. The investigation was initiated in response to Zuffa's acquisition of Strikeforce and the attendant effect on the relevant markets alleged here.

1 Zuffa's attempt to characterize the response rate of the application of its search terms to
 2 the productions to date as "misleading" is itself misleading in several ways. Zuffa states that its
 3 "proposed search terms 'hit' on 84% of the newly-produced Zuffa documents (those documents
 4 with a ZFL- Bates number prefix)...." However, it is unsurprising that Zuffa's search terms "hit"
 5 on 84% of the ZFL production because the ZFL production consisted almost entirely of
 6 Promotional & Ancillary Rights Agreements with members of the class. Plaintiffs' search terms,
 7 for example, "hit" 99.14% of the ZFL production. If Zuffa's search terms were well designed,
 8 they should return nearly 100% of those agreements, certainly more than 84%. Regardless, it is
 9 apparent that Zuffa has cherry picked a subset of documents that it has produced to maximize the
 10 "hit" rate which, in context only proves the point that Zuffa's search terms are not reliable. Zuffa
 11 also asserts that Plaintiffs' statement that Defendant's search terms return only 52.86% (56,902)
 12 is misleading because Zuffa will produce not only the documents which result in "hits" but also
 13 those documents attached to the "hits."²⁶ Zuffa states that, when the attachments are considered,
 14 Zuffa's terms return "69% of the re-production of documents produced to the FTC (those
 15 documents with a ZUF- Bates number prefix)." Plaintiffs have applied Zuffa's search terms, but
 16 have not yielded the same "hit" rate result claimed by Zuffa. Rather, when Plaintiffs run
 17 Defendant's search terms with these parameters, the search returns 64,549 documents, a mere
 18 59.96%. Thus, regardless of whether Defendant's inflated returns that include the attachments are
 19 used, Defendant's search terms still fail to capture more than 40% of the documents produced to
 20 the FTC.²⁷ When Plaintiffs' proposed search terms are used to capture both the "hits" and
 21 attachments, the return is 100,756 of 107,649 (93.69%). That Defendant's terms are inadequate is
 22 not misleading, it is clear based on their application.

23
 24 ²⁶ Zuffa argues that Plaintiffs' figure does not account for the fact that Zuffa would also produce
 25 documents attached to the search hits. But whether attachments are included in this analysis does
 26 not give much comfort because other relevant yet-to-be-produced documents which are not so
 27 attached but are nevertheless relevant and responsive will be excluded. Thus, the viability of
 28 search terms must be determined based on the search term hit-rate not on the rate plus the number
 of documents that happen to be attached to the hits.

27 Even if Defendant's 69% figure is correct, Defendant's method fails to return more than 30%
 28 of these responsive documents which is still inadequate by any reasonable measure.

1 Zuffa has indicated that its search term proposal applies to Plaintiffs' Requests for
 2 Production of Documents 15-25, 27, 29, 31, 33, 35, 37, 40-45, 47 and 51.²⁸ However, Zuffa's
 3 proposed terms fail to sufficiently target many of these Requests and fail to target some at all. For
 4 example, in Request No. 15, Plaintiffs sought documents constituting and related to third-party
 5 analyst and consultant reports regarding Zuffa and the MMA industry, including "reports that
 6 analyze or project demand, revenues, income, profits or market share derived from or relating to
 7 MMA bouts, Merchandise Rights in the MMA Industry, or Promotional and Ancillary Rights in
 8 the MMA Industry." Aside from naming a few past and present promoters, Defendant's proposed
 9 search terms do not address Request 15 in any form.²⁹ Similarly, Request 16 seeks documents
 10 comparing or analyzing athlete compensation models between different MMA promoters and
 11 other professional sports. Again, aside from naming a few past and present promoters,
 12 Defendant's proposed terms fall well short of targeting responsive documents. For example,
 13 Defendant's proposed terms do not target documents containing obvious key terms such as
 14 "compensation," "pay" and "professional sports."³⁰ Requests 15 and 16 are mere examples.
 15 Defendant's proposed search terms either fail to capture an adequate percentage of responsive
 16 documents in Defendant's custodians' possession, custody or control, as Defendant's terms fail to

17
 18 ²⁸ Plaintiffs' Requests for Production of Documents were filed in connection with the Motion to
 Stay and are available at Dkt. No. 107-1.

19 ²⁹ Defendant argues below that Plaintiffs' argument is misleading because Defendant has
 20 proposed to respond by searching the finance department's files without the use of search terms
 21 for documents responsive to Request No. 15. Notably, Defendant does not dispute that it is
 22 relying on search terms to collect responsive documents. Indeed, the quoted Response to Request
 23 No. 15 also expressly states, "Zuffa will also collect and review other documents responsive to
 24 this Request subject to an agreement on search terms designed to cull documents responsive to
 25 this Request." Thus, irrespective of any other method used to cull responsive documents,
 26 Defendant has proposed to use search terms to locate responsive documents and yet, Defendant's
 27 proposed terms fail to use search terms that are targeted to do so.

28 ³⁰ In addition to the responsiveness of terms like "professional sports" and "NFL" to this
 Request, the Consolidated Amended Complaint makes reference to several instances where
 Zuffa's officers and employees compare the UFC to the NFL. CAC ¶¶ 8, 15, 70. At the motion to
 dismiss hearing, Judge Boulware indicated that he required context for these statements before
 ruling on their relevance and effect. Defendant's proposed search terms are also deficient for
 excluding terms such as the "NFL," notwithstanding the clear relevance of such terms to the
 Requests Defendant proposed to respond to with documents culled from search term hits.

1 adequately target documents responsive to any of these Requests. By contrast, Plaintiffs' search
 2 terms were designed to more reliably capture documents responsive to all of Plaintiffs' Requests,
 3 not just a select few.

4 Zuffa cites RFP 27 as an overbroad request arguing that its search terms are a practical
 5 way of narrowing the Request. However, during the meet-and-confer process, Plaintiffs have
 6 made several proposals to narrow the scope of RFP 27, all of which Zuffa rejected without a
 7 counterproposal. Regardless, Zuffa's argument is a red herring. Zuffa claims that its search terms
 8 are necessary because under the plain language of RFP 27, communications "between a Zuffa
 9 employee and a venue regarding any matter from insurance and indemnity to lighting and security
 10 to concessions is called for." Not only have Plaintiffs expressly told Zuffa that they are not
 11 seeking such documents, there is absolutely no indication that any of the 19 custodians at issue
 12 for whom Zuffa has documents ever communicated about or had day-to-day responsibilities for
 13 the subjects it identified, and Zuffa has not demonstrated otherwise. Rather than a practical tool to
 14 narrow Plaintiffs' Requests, Zuffa's search terms are a tool to shield relevant documents from
 15 production.

16 Zuffa argues that its approach is consistent with the requirement in Federal Rule of Civil
 17 Procedure 26(b)(1) that discovery must be "proportional to the needs of the case." However,
 18 Zuffa fails entirely to explain how or why its proposal is "proportional." Rule 26(b)(1) continues
 19 that the discovery sought must be "proportional to the needs of the case, considering the
 20 importance of the issues at stake in the action, the amount in controversy, the parties' relative
 21 access to relevant information, the parties' resources, the importance of the discovery in resolving
 22 the issues, and whether the burden or expense of the proposed discovery outweighs its likely
 23 benefit." Tellingly, Zuffa does not address any of the proportionality factors but rather simply
 24 states what it is searching for with search terms and without. The proportionality factors weigh
 25 heavily in Plaintiffs' favor. The issues at stake in the litigation are of paramount importance to the
 26 professional careers and livelihoods of over 1,000 professional athletes (whom Plaintiffs allege
 27 have been vastly underpaid and mistreated) and the future of the sport of MMA in the United
 28 States which is the fastest-growing and one of the largest sports in the country. Although

1 Plaintiffs have not formally quantified their damages and require documents and information
 2 from Zuffa to do so, Plaintiffs estimate that the amount in controversy is hundreds of millions of
 3 dollars. Zuffa's resources are vast. Zuffa's own President, Dana White, estimated that Zuffa was
 4 valued at over \$3.5 billion dollars; 89% of the company is owned by billionaires Frank and
 5 Lorenzo Fertitta. *See, e.g., Lunch with the FT: Dana White*, Financial Times, Mar. 21, 2014
 6 (stating Zuffa's worth "\$3.5bn. Some would say more"), available at <http://www.ft.com/cms/s/2/03ccce22-aebf-11e3-aaa6-00144feab7de.html#axzz2wuELYEwq>. Discovery is critically
 7 important to the proof of Plaintiffs' allegations as it is in every complex antitrust class action.
 8 Moreover, Plaintiffs allege that Zuffa's anti-competitive conduct was a deliberate scheme that
 9 relied, in part, on the use of threats and other illicit conduct that is the type of evidence gleaned
 10 from the company's internal documents and communications. Zuffa has not demonstrated what
 11 burden it would incur by not applying search terms or applying Plaintiffs' far more reliable terms.
 12 Regardless, as discussed above, applying Zuffa's search terms to the documents it has already
 13 produced results in hits for an unacceptably low proportion of the those documents. Thus, it is
 14 evident that the application of search terms (or at least applying Zuffa's search terms) does not
 15 outweigh the benefit or risk of not using them.

17 **2. Zuffa's Statement**

18 **a. Search Terms Are Necessary and Appropriate in this Case**

19 The use of search terms is a standard discovery tool that reduces the burden and expense
 20 of document review and production and increases the speed with which documents can be
 21 produced. *EEOC v. McCormick & Schmick's Seafood Restaurants, Inc.*, No. WMN-08-0984,
 22 2012 WL 380048, at *4 (D. Md. 2012) ("Common practice governing the discovery of
 23 electronically stored information requires the use of search terms to make an extraordinarily
 24 burdensome search comply with the tenets of Fed. R. Civ. P. 26(b)(2)(C)"). This Court has
 25 already made clear that it wants the parties to manage discovery in an efficient and cost-effective
 26 way including the use of search terms as well as non-traditional methods of searching ESI to the
 27 extent possible. Dkt. 156, Jul. 28, 2015 Tr. 29:18-25; Dkt. 210, Dec. 8, 2015 Tr. 22:5-13, 30:10-
 28 16. Search terms are particularly necessary where, as here, the Requests for Production are vastly

1 overbroad, calling for essentially all documents relating to any communication with or about any
 2 actual or potential venue, sponsor, merchandiser, retailer or TV distributor.³¹

3 With document requests of such broad scope, the use of search terms is necessary for the
 4 efficient and cost-effective management of discovery. Although Zuffa's collections are not yet
 5 complete, the volume of documents in this case is already massive. Before adding in the six
 6 custodians Plaintiffs designated on January 8, Zuffa had already collected and processed over 1.2
 7 million (de-duplicated) email documents from the sixteen agreed-upon custodians. Even when
 8 the end date of June 30, 2015 is applied, with the addition of the six additional custodians' emails
 9 currently being processed, and the non-email ESI and hard copy documents from the twenty-two
 10 total custodians, there will still be well over a million custodial documents that fall within the
 11 Relevant Time Frame.

12 Moreover, the volume of non-custodial documents is also substantial. In addition to the
 13 Strikeforce documents already produced, Zuffa has already collected and processed over 45,000
 14 hard copy documents and is in the process of collecting and processing more. Zuffa has also
 15 collected, or is in the process of collecting, more than 137,000 additional electronic files from
 16 centralized drives. When the collection and processing of the custodian-specific and non-
 17 custodial electronic and hard copy files are complete, the number of documents collected in this
 18 case will likely be in the millions. Plaintiffs' proposal that Zuffa should be required to review
 19

20 ³¹ Plaintiffs' Requests for Production contain a number of substantially overbroad Requests
 21 demanding production of "All Documents" relating to various overbroad subjects. For example,
 22 Request 20 calls for All Documents "discussing, evaluating, or analyzing actual or proposed
 23 contractual terms or provisions." Request 27 calls for "All Documents referencing or relating to
 24 agreements (and any amendments thereto) regarding venues for professional MMA bouts"
 25 including "without limitation, communications and/or negotiations between You and any venue
 26 or owner, operator, agent or manager of any venue, draft agreements, proposals, presentations,
 27 and internal communications, memoranda, spreadsheets and analyses referencing or relating to
 28 such negotiation, regardless of whether the negotiation resulted in an executed agreement." Similarly
 overbroad Requests call for "All Documents" relating to sponsorships, merchandising relationships,
 retailers or broadcasters. Dkt. 107-1, RFPs 33, 35, 37. Since the Complaint only alleges that certain aspects of the contracts with these third-parties are anticompetitive, (the
 alleged exclusivity provisions), these Requests are not tailored to the allegations of the
 Complaint.

1 each of those documents without the use of search terms is wholly unreasonable and would be
 2 prohibitively expensive.

3 Federal Rule of Civil Procedure 26(b)(1) was revised in December of 2015 to clarify that
 4 discovery must be “proportional to the needs of the case.” Zuffa’s approach is just that. First,
 5 Zuffa is collecting and reviewing substantial numbers of documents without the use of search
 6 terms. These include documents from (1) the hard copy fighter files, (2) the electronic fighter
 7 files, (3) the hard copy venue and broadcaster files (including cable, TV, Pay-Per-View and
 8 online distribution), (4) the hard copy partnership (sponsorship) files, (5) hard copy corporate
 9 records, and (6) financial files, as well as certain other targeted searches for specific documents.
 10 Zuffa has already produced close to 18,000 documents comprising almost 250,000 pages of
 11 material from those sources as part of that review.³² Zuffa has also agreed to review text
 12 messages without the use of search terms; because the custodians’ cell phones contain both
 13 personal and business text messages, Zuffa will have to cull and review large volumes of text
 14 messages. Zuffa proposes to use search terms, however, in order to help identify the universe of
 15 relevant documents in response to Plaintiffs’ broad Requests in the following locations: (1)
 16 Zuffa’s relevant shared drives, which encompass Zuffa’s non-custodial electronic “central” files,
 17 and (2) the twenty-two custodians’ ESI. Zuffa has not proposed to limit its extensive hard copy
 18 document collection through search terms. Given the number of “All Documents” requests, Zuffa
 19 believes this is the most efficient way to provide Plaintiffs the documents they have requested
 20 while balancing the burdens and expense of the process.³³

21 Although the party requesting documents traditionally supplies the initial list of search
 22 terms, Plaintiffs requested, and Zuffa provided, a proposed list of search terms that could be used
 23 to identify relevant documents responsive to Plaintiffs’ Requests for Production on December 21,
 24 2015. Zuffa’s list is comprised of 91 separate terms including broad terms central to the issues in
 25

26 ³² When the Strikeforce production is added in, Zuffa has already produced, without the use of
 27 search terms, more than 125,000 documents comprising over 470,000 pages.
 28 ³³ The “handful of central files” to which Plaintiffs refer include a collection in excess of 400,000
 pages of hard copy documents and over 200,000 centrally-maintained electronic documents.

1 this case, such as “exclusive*,” “extend* or extension”, and “contract w/2 negotiat*”.³⁴ Zuffa
 2 has made it clear to Plaintiffs that it is willing to discuss the addition or modification of terms on
 3 this list and would be amenable to tailoring search terms to particular custodians based on their
 4 responsibilities.

5 Plaintiffs’ suggestion that Zuffa has not responded to their “proposals” for narrowing is
 6 not accurate. In the course of meet and confers, Plaintiffs have stated that they are not interested
 7 in documents such as those dealing with routine logistical matters or other concededly irrelevant
 8 matters such venue insurance or security. The problem from Zuffa’s point of view is that
 9 Plaintiffs have not made any proposal that would reduce the burden of reviewing all those
 10 irrelevant documents. Zuffa has consistently told Plaintiffs it would review and produce from the
 11 central hard copy and electronic contract files without the use of search terms, but it believed that
 12 search terms were the only practical way to limit the search of the vast collection of ESI. For
 13 example, with regard to RFP 33 (broadcasters), on January 11, Plaintiffs made a proposal that
 14 included, among other things; “(3) communications and/or negotiations between Zuffa and any
 15 broadcaster of professional MMA events (including PPV and online distribution), including
 16 negotiations which did not result in agreement,” in other words, all communications with
 17 broadcasters regardless of subject matter. Jan. 11, 2016 M. Dell’Angelo Letter to J. Cove. Zuffa
 18 rejected this as overbroad because it was not limited as to subject matter and would encompass
 19 every aspect of Zuffa’s day-to-day dealings with broadcasters.

20 Plaintiffs mischaracterize the record with regard to RFP 15 which calls for third party
 21 financial analyst report and similar documents. In fact, Zuffa agreed to search the finance
 22 department for such documents, and then also use search terms to determine whether additional
 23 reports might exist.³⁵

24
 25 ³⁴ Zuffa’s list of search terms is provided as Attachment B.
 26 ³⁵ Sept. 29, 2015 Letter from J. Cove (“We are searching for and producing third-party analyst or
 27 consultant reports responsive to this request that are found in Zuffa’s Finance department. We
 28 are continuing to investigate what other reports may exist. In any event, we will produce
 responsive third party reports from the documents of custodians agreed upon by the parties using
 search terms and other parameters that the parties will negotiate to cull such documents prior to

1 Plaintiffs' proposal that the substantial volumes of documents in this case should be
 2 reviewed without the aid of search terms to narrow the scope to those documents likely to contain
 3 relevant evidence should be rejected outright. Plaintiffs' proposed approach is a significant
 4 departure from common practice in modern antitrust cases with large numbers of documents,
 5 grossly disproportionate to the needs of this case, inefficient and cost-prohibitive, and particularly
 6 unwarranted in light of Plaintiffs' overbroad Requests. Plaintiffs have not shown that this case is
 7 so unique that the normal and efficient process of using well-chosen search terms should not be
 8 used. Zuffa remains open to working with Plaintiffs on devising a workable list of search terms
 9 to streamline the review of the substantial volume of documents involved in this case.

10 **b. Plaintiffs' Proposed Search Terms Are Vastly Overbroad and
 11 Would Not Meaningfully Reduce the Burden of Complying with
 Plaintiffs' Overbroad RFPs**

12 On January 19, Plaintiffs provided for the first time a counter-proposal of search terms – a
 13 single-spaced 8-page list consisting of over 2,500 search terms – that they believe should be used
 14 if the Court determines search terms are appropriate. On January 21, Plaintiffs sent a revised list
 15 of search terms comprising over 2,300 terms. Plaintiffs' list contains 8 categories of search
 16 terms: Promoters, Agents, Sponsors, Media, Broadcasters, Venues, General Terms, and Fighter
 17 Names and Nicknames. Plaintiffs appear to include, among other things, the last names and
 18 nicknames and some first names of all UFC fighters as well as their managers or agents, and the
 19 names of most or all sponsors, venues, or media or broadcasters that have done business with
 20 Zuffa to be searched across all twenty-two custodians and all non-custodial ESI files. Although
 21 Plaintiffs yesterday withdrew many of the common first names such as "Steve," "Brian," and
 22 "Joe," from their January 19 list, their revised list still include many others such as "Michael," or

23
 24 review for responsiveness and privilege."); December 21, 2015 Letter from J. Cove ("Zuffa has
 25 been collecting and producing documents from Zuffa's finance department as well as many other
 26 locations. At this point, the collection and review process is still ongoing. Zuffa will produce
 27 third party analyst or consultant reports from the finance department on a rolling basis. Zuffa will
 also collect and review other documents responsive to this Request subject to an agreement on
 search terms designed to cull documents responsive to this Request.")

1 “Jason,” or “Lindsey,” as well as common last names such as “Johnson or Jones or Jordan” or
 2 “Miller” or “Smith.”³⁶ Of course, Plaintiffs’ statement suggests some of search terms that are
 3 appropriate to be added to the list, but their January 21 list of over 2,300 search terms will not
 4 reduce the burden of review nor address the overbreadth of the RFPs, is not tailored to the needs
 5 of the case, and does not serve as a useful starting point for discussion.

6 The effect of Plaintiffs’ proposed search terms would be to capture every document that
 7 referred to any fighter, manager, venue, sponsor, or TV network, as well as any document that
 8 happened to mention any “Michael,” “Jason,” “Lindsey,” etc., regardless of the subject matter.³⁷
 9 Thus, this list is even broader than the Plaintiffs’ already overbroad RFPs, which do not call for
 10 every document related to every fighter. To be clear, Zuffa’s original list included, and Zuffa has
 11 no objection to, search terms including the Plaintiffs and their managers’ names; all fighters,
 12 however, is far too broad. Further, Zuffa has already agreed to review the electronic and hard
 13 copy fighter files without the use of search terms in order to provide Plaintiffs with relevant
 14 documents and has already made a production of nearly 18,000 documents as a result of this
 15 review. It also has already provided comprehensive financial information showing compensation
 16 paid to every fighter in the Relevant Time Period, broken down by category, e.g., bout purses,
 17 bonuses, Pay-Per-View shares, etc. Targeted search terms like those Zuffa has proposed will also
 18 readily identify other relevant documents from other files.

19 Similar problems exist in Plaintiffs’ proposal for search terms regarding venues, sponsors,
 20 media and broadcasters. With regard to venues, Plaintiffs’ Complaint alleges that Zuffa “imposes
 21 exclusivity provisions into its physical venue agreements that severely limit, and in some cases
 22 remove altogether, the ability of any would-be competitor to hold MMA events at premier venues
 23 in the U.S.” Cons. Am. Comp. ¶ 122. But Plaintiffs’ overbroad Request for Production seeks
 24 documents far beyond agreements and documents necessary to assess the scope of any alleged

25 ³⁶ While the additional terms listed under “Promoters” are still somewhat overbroad, the
 26 Promoter list is at least a reasonable starting point for a discussion.

27 ³⁷ These terms are certain to pull up significant numbers of documents having nothing to do with
 28 the fighters, given that many Zuffa employees also have these common names (as Plaintiffs are
 aware from the organizational charts that Zuffa provided).

1 exclusivity provision. Rather, it seeks “All Documents referencing or relating to agreements”
 2 including “communications and/or negotiations between You and any venue owner, operator,
 3 agent or manager of any venue, draft agreements, proposals, presentations, and internal
 4 communications, memoranda, spreadsheets, and analyses” Dkt. 107-1, RFP 27. Thus, under
 5 the plain language of Plaintiffs’ Request, communications between a Zuffa employee and a venue
 6 regarding any matter from insurance and indemnity to lighting and security to concessions is
 7 called for. While Plaintiffs have stated that they are not interested in documents related to the
 8 routine logistics of these events, their proposal to add as search terms of the names of venues that
 9 Zuffa has done business with in the United States (e.g., “MGM,” “Mandalay,” etc.) will likely
 10 pull up every document or communication with anyone from the venue relating in any way to the
 11 event or the venue, as well as every ad or promotional material that mentions the event (or any
 12 other event at that venue), the vast majority of which will be irrelevant but Zuffa will still have to
 13 go through the burden of reviewing. The same is true for Plaintiffs’ proposal regarding sponsors,
 14 media, and broadcasters. Zuffa’s search term proposal, on the other hand, is a practical way to
 15 narrow this overbroad Request, through the use of search terms, that would help to identify
 16 documents responsive to the Request that are relevant to the allegations in the Complaint. Zuffa
 17 proposed search terms in order to accomplish this goal, such as: *exclusive**, (contract w/2
 18 negotiat*) and (venue w/2 (agreement or contract)).

19 Plaintiffs claim that Zuffa’s search terms are not a good fit because they “hit” on only a
 20 percentage of documents from the productions that Zuffa has already made. These numbers are
 21 misleading. As Plaintiffs are aware, and as is required in the ESI Stipulation, the parties are
 22 maintaining parent-child relationships when producing documents. *See* Dkt. 160, ESI Stip. at
 23 15. What this means in practice is that if a search term “hits” on a document and that document is
 24 responsive, the entire family of documents will be reviewed and produced (unless protected by
 25 privilege) even if the family members do not contain any search terms. Therefore, if a parent e-
 26 mail contains a search term and its five attachments contain no search terms, all six documents
 27 will be reviewed and produced. Similarly, if one of the five attachments contains a search term
 28 (and neither the cover e-mail nor the other attachments do), the cover e-mail and all of the
 28

1 attachments will be produced. As a result, Plaintiffs' claim that Zuffa's proposed search terms
 2 would have only hit on 57% of its already-produced documents is misleading. When families are
 3 included in the calculation – as they must be – Zuffa's proposed search terms "hit" on 84% of the
 4 newly-produced Zuffa documents (those documents with a ZFL- Bates number prefix) and on
 5 69% of the re-production of documents produced to the FTC (those documents with a ZUF- Bates
 6 number prefix).³⁸

7 Further, many of the already produced documents that Plaintiffs claim do not contain
 8 Zuffa's proposed search terms fall within the categories of documents for which Zuffa has not
 9 proposed search terms, such as hard copy documents, corporate records and centralized financial
 10 data. For example, numerous documents that did not "hit" on Zuffa's proposed search terms are
 11 financial pro formas and other financial ESI; these documents have been collected and produced
 12 and will continue to be collected and reviewed without the aid of search terms in response to
 13 RFPs 9 through 14. Since Zuffa is not relying on search terms to identify these types of
 14 documents in any event the "hit" figures above suggest a high degree of reliability for the
 15 proposed search terms.³⁹

16 At this stage, Plaintiffs' list of over 2,300 terms is so broad that it cannot be taken as a
 17 serious proposal for search terms at all but rather an attempt to have Zuffa review every document
 18 that it collects. Zuffa is willing to meet and confer on these search terms in an attempt to address
 19

20 ³⁸ Plaintiffs' assertion that, Zuffa refused to tell them "which custodians and central files were
 21 searched" for this production is wrong. As explained in M. Lynch's Oct. 22, 2015 email, Zuffa
 22 provided the metadata fields that were produced to the FTC and even converted them into the
 23 equivalent metadata fields agreed upon in the ESI stipulation for this case. These fields provided
 24 Plaintiffs with information regarding custodians from whom the documents were collected.

25 ³⁹ Plaintiffs cite the Sedona Conference's Best Practices Commentary on Search and Information
 26 Retrieval. As the Commentary makes clear, however, its concerns regarding "keyword searches"
 27 relate to the use of "simple keyword" searches that do not include Boolean operators or variations
 on words. Commentary at 17. Zuffa proposed numerous Boolean and wildcard searches in its
 initial list of proposed search terms to address exactly this issue. For example, rather than simply
 proposing "sponsorship agreement," Zuffa proposed to run (sponsor* w/2 (agreement or
 contract)) to help identify such documents. In any event, Sedona Commentary is not the
 governing law; the Federal Rules, which have been recently amended to ensure proportionality,
 are the touchstone for this analysis.

1 some of the differences in scope of their respective proposals, but Plaintiffs must be willing to
 2 make a good faith effort as well.

3 If the parties cannot reach an agreement on search terms or other reasonable limits on the
 4 overbroad Requests, Zuffa reserves the right to move the Court to strike the overbroad and
 5 burdensome Requests in their entirety.

6 **C. Relevant Time Period for Plaintiffs' Production of Documents in Response to
 7 Four of Zuffa's Requests for Production**

8 **1. Joint Statement:**

9 Through multiple meet-and-confer discussions and correspondence, the parties have
 10 largely come to an agreement regarding the Relevant Time Period for Zuffa's Requests for
 11 Production. The remaining dispute is the Relevant Time Period to be applied to Requests 3, 6, 14
 12 and 20.

13 **2. Zuffa's Statement**

14 For a discrete set of Requests – 3, 6, 14 and 20 – Zuffa proposes that Plaintiffs be required
 15 to produce responsive documents back to January 1, 2000. These four requests are not
 16 blunderbluss “All Documents” requests: RFPs 3 and 6 call for relevant contracts;⁴⁰ RFP 14 calls
 17 for documents sufficient to show compensation for combat-sports related activity;⁴¹ and RFP 20
 18 calls for documents sufficient to show tolling or extensions of contracts.⁴² As explained more

20 ⁴⁰ Request 3 calls for “All AGREEMENTS between YOU and any PERSON related to the
 21 provision of YOUR services or RIGHTS in connection with any COMBAT SPORT, or the grant
 22 of any of YOUR IDENTITY RIGHTS, including without limitation participation in any BOUT or
 competition, serving as a commentator, or making a personal appearance.”

22 Request 6 calls for “All AGREEMENTS between YOU and any SPONSOR.”

23 ⁴¹ Request 14 calls for “DOCUMENTS sufficient to show all compensation paid to YOU by any
 24 PROMOTER, including but not limited to YOUR base salary, payment or compensation; bonuses
 25 of any kind; discretionary payments; signing bonuses; broadcast royalties; PAY-PER-VIEW
 shares; MERCHANDISE payments; appearance fees; or any other compensation, broken down
 by date, PROMOTER, amount of payment, and source of revenue.”

26 ⁴² Request 20 calls for “DOCUMENTS sufficient to show any extensions to or tolling of the term
 27 of YOUR AGREEMENTS with any PROMOTER, including the duration and the reason for the
 tolling or extension.”

1 fully below, obtaining the contracts, extensions, and compensation data for the period between
 2 January 1, 2000 and January 1, 2005 is vital for Zuffa's defense, including because for at least
 3 half of the Plaintiffs, it is likely to be the only way to obtain any of their pre-UFC contracts with
 4 Zuffa's competitors. Providing documents for only one year before Plaintiffs Quarry, Vera and
 5 Fitch's first UFC bout is not sufficient because, given the prevalence of multi-bout agreements,
 6 they may not have signed an agreement in that time period with another promoter even if they
 7 competed in a bout for another promoter during that time. Moreover, these discrete requests do
 8 not entail substantial or undue burden in searching for and producing the limited number of
 9 contracts that each Plaintiff signed in that period, along with related compensation and extension
 10 information, and is certainly not disproportionate either to the needs of this case or in relation to
 11 the extensive efforts, including producing documents back to 2000, that Zuffa is undertaking.

12 The following are some, but not all, of the examples of why evidence from this timeframe
 13 is necessary. First, Plaintiffs have alleged that a wide spectrum of Zuffa's contractual provisions
 14 and practices are anticompetitive. That other MMA or combat sports promoters, who Plaintiffs
 15 must concede lacked market power, used the same or similar provisions or practices (e.g.,
 16 exclusivity provisions, certain rights "in perpetuity," or tolling or extension terms) tends to show
 17 that such provisions or practices serve legitimate business purposes and are not anticompetitive.⁴³
 18 Second, these contracts are also relevant to test Plaintiffs' allegations that they were effectively
 19 coerced by Zuffa's alleged abuse of its alleged monopsony power to agree to these terms –
 20 allegations that would be undercut by Plaintiffs' voluntary agreement to these terms with other
 21 promoters. Third, Plaintiffs have alleged both that the scheme to monopolize/monopsonize began
 22 in 2006 and that Zuffa's acquisition of certain competing promoters' businesses or assets reduced
 23 competition. Information and data on Plaintiffs' compensation before this time is necessary to

24
 25 ⁴³ Plaintiffs argue that firms with market power should not engage in anticompetitive conduct,
 26 but the threshold issue is whether the conduct is in fact anticompetitive. This requires an in-depth
 27 analysis of, among other things, the history and legitimate business purpose of the contractual
 28 provision. The conduct of other firms using similar provisions is relevant to that analysis. *Polk
 Bros. Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.) ("[one]
 must ask whether an agreement promoted enterprise and productivity at the time it was adopted").

1 test the before-and-after effect. Fourth, Plaintiffs have alleged that Zuffa has forced Plaintiffs to
 2 give up certain identity rights without any compensation. Zuffa is entitled to documents that
 3 could show that prior to signing with Zuffa, Plaintiffs entered into agreements with other
 4 promoters that, like Zuffa, compensated Plaintiffs under the agreement as a whole for a similar
 5 grant of identity rights. Fifth, Plaintiffs' contracts with promoters other than Zuffa, and the
 6 compensation paid under those agreements, in particular any contracts prior to the start of the
 7 alleged "scheme," are important to evaluating the competitive options that the Plaintiffs had
 8 before signing agreements with Zuffa.

9 Unless Plaintiffs are ordered to produce contracts back to 2000, Zuffa will likely not be
 10 able to obtain any of the contracts that half of the named Plaintiffs signed with Zuffa's
 11 competitors before they signed with Zuffa. Three of the named Plaintiffs, Jon Fitch, Brandon
 12 Vera, and Nathan Quarry, all began competing in the UFC in 2005 so all their pre-Zuffa contracts
 13 are with other promoters before that date.⁴⁴ According to public sources, Brandon Vera had four
 14 bouts with competing promoters between 2000 and his first UFC bout in 2005,⁴⁵ Jon Fitch had
 15 thirteen bouts with competing promoters between 2000 and his first UFC bout in 2005,⁴⁶ and
 16 Nathan Quarry had six bouts with competing promoters between 2000 and his first UFC bout in
 17 2005.⁴⁷ Of the other Plaintiffs, Luis Javier Vazquez had eight bouts with competing promoters
 18 between 2000 and 2005,⁴⁸ and Kyle Kingsbury had none. Cung Le apparently did not compete in
 19 any professional MMA bouts prior to 2006; however, Mr. Le did participate in other forms of
 20 combat sports, such as kickboxing and sanshou, prior to his MMA career, and any agreements
 21 and compensation related to his association with those other combat sports are also highly

22 _____
 23 ⁴⁴ Vera and Fitch also fought with competitive promotions after they left the UFC.

24 ⁴⁵ Brandon Vera, Fight History, <http://www.sherdog.com/fighter/Brandon-Vera-4886> (last
 25 accessed Jan. 19, 2016).

26 ⁴⁶ Jon Fitch, Fight History, <http://www.sherdog.com/fighter/Jon-Fitch-4865> (last accessed Jan.
 27 19, 2016).

28 ⁴⁷ Nate Quarry, Fight History, <http://www.sherdog.com/fighter/Nate-Quarry-2383> (last accessed
 29 Jan. 19, 2016).

⁴⁸ Javier Vazquez, Fight History, <http://www.sherdog.com/fighter/Javier-Vazquez-511> (last
 30 accessed, Jan. 19, 2016).

1 relevant to the issue of market definition, among others.⁴⁹ It would be grossly unfair to restrict
 2 Zuffa's ability to present evidence relating to these contracts with competitors and to inquire into
 3 this evidence with Plaintiffs in deposition or trial simply because the Plaintiffs may not maintain
 4 "sophisticated filing systems."

5 Providing this small number of contracts related to their pre-2005 events, along with any
 6 sponsorship contracts and requested compensation and extension information, entails minimal
 7 burden in light of the importance of this evidence, and the fact that equivalent evidence for these
 8 Plaintiffs after 2005 is either scarce or, for some Plaintiffs, non-existent. Plaintiffs have proposed
 9 that they take on the burden of class representatives. In light of the immense and expensive
 10 efforts that Zuffa is undertaking in this litigation, it is only a small burden to ask that Plaintiffs
 11 locate and produce their old contracts and the other requested information. The suggestion that
 12 third parties, rather than Plaintiffs, should undertake this is wrong. *Rocky Mountain Med. Mgmt.,*
 13 *LLC v. LHP Hosp. Grp.*, No. 4:13-CV-00064-EJL, 2013 WL 6446704, at *4 (D. Idaho Dec. 9,
 14 2013) ("non-parties should not be burdened with the annoyance and expense of producing the
 15 documents sought unless the requesting party is unable to discover them from a party") (citing
 16 *Bada Co. v. Montgomery Ward & Co.*, 32 F.R.D. 208, 209-10 (S.D. Cal. 1963)).

17 Finally, Plaintiffs requested, and Zuffa agreed to produce, its documents relating to
 18 Plaintiffs without limitation as to time, and its agreements and other related documents in the
 19 fighter files with proposed members of the alleged Bout Class back to 2000 or before, if
 20 applicable, as well as certain financial information back to 2000. Zuffa believes that given the
 21 importance of these documents, the minimal burden, if any, of extending the time period for these
 22 narrow categories of Requests, and Zuffa's agreement to produce similar documents during this
 23 time frame, that parity from the Plaintiffs is appropriate.

24 **3. Plaintiffs' Position (Plaintiffs' Statement)**

25 Defendant seeks production of documents responsive to Requests for Production 3, 6, 14
 26 and 20 back to January 1, 2000 – more than 16 years ago and nearly 10 years prior to the

27
 28 ⁴⁹ Cung Le Website, Fight Profile, <http://cungle.com/fight-profile/> (last accessed, Jan. 19, 2016).

beginning of the proposed class period on December 16, 2010.⁵⁰ This proposed 16-year time period is unreasonable and disproportionate to the needs of the case. *See Fed. R. Civ. P. 26(b).* Plaintiffs propose to produce responsive documents covering the time frame to which the parties have agreed for the remainder of Defendant's requests: documents dated on or after October 3, 2004 by Plaintiffs Fitch and Vera; documents dated on or after April 9, 2004 by Plaintiff Quarry; and documents dated on or after January 1, 2005 by the other three Plaintiffs.⁵¹ This time frame is more reasonable and proportionate to the needs of the case, and corresponds more closely to the time frame the Court has applied to the vast majority of Plaintiffs' document requests: "a uniform time period of January 1, 2005, through June 30th of 2015." Nov. 17, 2015 Status Conf. Tr., at 20:8-10.

The only documents Defendant is producing from prior to January 1, 2005 are certain financial information and the fighter contracts with Bout Class members that, by Defendant's own admission, are "the core of the case."⁵² Moreover, Defendant, unlike Plaintiffs, is a large corporation with a sophisticated filing system, including separate files for contracts, thereby reducing the burden to Defendant of searching for and producing its admittedly centrally relevant documents.

Plaintiffs are not corporations with sophisticated filing systems, and unlike Defendant, do not maintain separate files containing all of their contracts and related documents. Therefore, in order to produce the requested documents back to January 1, 2000, Plaintiffs' counsel would need to review *all* of Plaintiffs' documents – paper and electronic – back to January 1, 2000, even though the proposed class period begins in December 2010, and none of the Plaintiffs fought for Defendant before 2005. This creates a substantial, disproportionate burden in light of the minimal likelihood that Plaintiffs' documents dating more than one year before their first UFC bouts – and more than five years before the proposed class period – are relevant.

⁵⁰ These requests seek production of contracts, documents reflecting compensation, and documents reflecting tolling or extensions of contracts.

⁵¹ The lone exception is Defendant's RFP 1, which the parties have agreed not to limit with respect to time frame.

⁵² Nov. 17, 2015 Status Conf. Tr., at 20:23-24.

1 Defendant's purported justifications for this broad, disproportionate discovery ring
2 hollow. First, Defendant speculates that other promoters may have used contractual provisions
3 similar to those Plaintiffs claim are anticompetitive. Of course, the law is clear that entities with
4 market power may not employ contractual provisions that are anticompetitive, even if those same
5 provisions would be lawful if employed by an entity without market power. *Image Tech. Servs.,*
6 *Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997) (“Legal actions, when taken by a
7 monopolist, may give rise to liability if anticompetitive.”) (citation omitted). Moreover, Plaintiffs
8 have agreed to produce these documents dating from 2004 (for three Plaintiffs) or 2005 (for the
9 other three Plaintiffs) to the present. And Defendant is free to issue third-party subpoenas to other
10 promoters to obtain samples of their class-period fighter contracts, rather than compel Plaintiffs to
11 dig through 16 years’ worth of paper and electronic files fishing for contracts and related
12 documents pre-dating the proposed class period by more than 5 years.

13 Second, Defendant claims it is entitled to “test” Plaintiffs’ claims that it used its market
14 power to impose these anticompetitive terms on Plaintiffs. The contractual terms used by other
15 promoters at an earlier stage of Plaintiffs’ careers are entirely irrelevant to the question whether
16 Defendant used its market power to impose anticompetitive terms on Plaintiffs and other class
17 members during the proposed class period. Plaintiffs have agreed to produce these documents
18 dating from 2004 (for three Plaintiffs) or 2005 (for the other three Plaintiffs). And again,
19 Defendant is free to use third-party discovery to obtain samples of contracts other promoters used
20 during the proposed class period, rather than force Plaintiffs to undergo a highly burdensome
21 search for documents pre-dating the proposed class period by 5-10 years.

22 Third, Defendant claims these documents are relevant to test the before-and-after effect of
23 Defendant's allegedly anticompetitive conduct. A small sample of very old contracts dug from
24 the files of a few fighters will not permit any systematic analysis of the before-and-after effects of
25 Defendant's conduct, and is essentially a red herring. There are much more statistically rigorous
26 ways of analyzing the effects of Defendant's conduct, and both sides and their experts will
27 undoubtedly employ them.

1 Fourth, Defendant speculates that other promoters' pre-class period contracts will contain
 2 similar "identity rights" provisions to those challenged by Plaintiffs. Again, even assuming
 3 Defendant speculates correctly, the same contractual provision that is lawful when employed by
 4 an entity without market power may be unlawful when employed by an entity with market power.
 5 *Image Tech. Servs.*, 125 F.3d at 1207. Moreover, the MMA market was very different from 2000-
 6 2005 than it is today; other promoters' "identity rights" provisions pre-dating the class period by
 7 5-10 years are simply irrelevant. Plaintiffs have agreed to produce these documents dating from
 8 2004 (for three Plaintiffs) or 2005 (for the other three Plaintiffs), and Defendant remains free to
 9 subpoena samples of class-period contracts from third-party promoters. That will enable
 10 Defendant to determine whether similar "identity rights" provisions were employed by other
 11 promoters during the relevant time period.

12 Fifth, Defendant contends that these contracts are relevant to determine what competitive
 13 options Plaintiffs had before signing with Zuffa. Again, these contracts, assuming they exist
 14 somewhere in Plaintiffs' files, pre-date the proposed class period by 5-10 years, and have little, if
 15 anything, to say about Plaintiffs' options during the 2010-2015 class period. Plaintiffs have
 16 agreed to produce these documents dating from 2004 (for three Plaintiffs) or 2005 (for the other
 17 three Plaintiffs) to 2015. These documents will provide Defendant with any information they
 18 need about Plaintiffs' contracts with other promoters, from a more relevant time frame closer to
 19 the events in dispute. A fishing expedition for Plaintiffs' contracts and other documents more than
 20 11 years old is simply unwarranted, unduly burdensome, and disproportionate to the needs of the
 21 case.

22 D. **Plaintiffs' Production of Documents Regarding Compensation Unrelated to**
 23 **MMA**

24 1. **Zuffa's Statement**

25 Zuffa's Requests 2 and 15 call for information relating to income/compensation that
 26 Plaintiffs received from MMA-related sources and from sources outside of MMA, including
 27
 28

1 income or compensation earned from other combat sports.⁵³ Plaintiffs have objected to the
 2 provision of any information regarding non-MMA related compensation. This information is
 3 relevant to a number of claims that Plaintiffs have put in issue in their Complaint, as well as
 4 Zuffa's anticipated defenses. Here are some examples:

5 First, Plaintiffs have alleged that Plaintiffs granted Zuffa "exclusive and perpetual
 6 worldwide personality and Identity Rights" that prevent "MMA Fighters from financially
 7 benefitting from the reputations that they built during their MMA careers . . . and locking UFC
 8 Fighters out of revenues generated by the exploitation of their Identities, including *after* the term
 9 of the contract." Cons. Am. Comp. ¶ 113(d). Through that allegation, Plaintiffs have put at issue
 10 compensation they have earned from the use of their identity in MMA and elsewhere, for
 11 example, if Plaintiffs were compensated for an appearance in a movie or had a DVD workout
 12 video that used their name or likeness, including where the UFC name or brand may have been
 13 expressly used. Zuffa is entitled to show that Plaintiffs' grant of rights to Zuffa is narrow and the
 14 sort commonly granted with copyrightable material and that Plaintiffs can and do still use and
 15 monetize their name and likeness in a variety of ways in MMA and elsewhere. Plaintiffs' refusal
 16 to provide such information is an attempt to prevent Zuffa from discovering relevant information
 17 that will undermine their overbroad and misleading allegation.

18 Second, Plaintiffs allege that Zuffa manipulates contract extensions and tolling to extend
 19 contracts "indefinitely." But some athletes choose to take time off from fighting during the term
 20 of their contracts and engage in other remunerative activities, either because they find other
 21 opportunities more lucrative or they simply want a break from training and competition (or a
 22 combination of those factors). Plaintiff Cung Le, for example, has been able to parlay his renown

23 ⁵³ RFP 2: All tax returns YOU filed in the past seven (7) years, with attached schedules,
 24 including all federal, state, and local returns you filed in the United States and any tax documents
 you filed in any foreign jurisdiction.

25 RFP 15: DOCUMENTS sufficient to show all income YOU received from any source other than
 26 a PROMOTER since YOU became a Professional MMA fighter, including information showing
 27 the amount YOU received; the source of that income; the service rendered or property, whether
 28 tangible or intangible, delivered in exchange for any payment; the date on which the payment was
 received; and, for recurring payments, the frequency of such payments.

1 as a martial artist and MMA athlete to land movie and TV roles. The extent to which Plaintiffs
 2 engaged in other activities besides MMA and were compensated for it is relevant to the issue of
 3 why contracts extended beyond their original stated term.⁵⁴

4 Third, Plaintiffs have asserted that “there are no reasonably interchangeable sports to
 5 which Elite Professional MMA Fighters can turn when demand and compensation for Elite
 6 Professional MMA Fighters is artificially suppressed below competitive levels.” Cons. Am.
 7 Compl. ¶ 80. Zuffa is entitled to understand what compensation Plaintiffs have received from
 8 other sports and activities that Plaintiffs assert are not reasonably interchangeable. To be clear,
 9 Plaintiffs’ proposal to exclude all income and compensation unrelated to MMA would exclude
 10 the production of documents related to other combat sports in which at least one named Plaintiff
 11 has competed at a professional level.⁵⁵

12 Fourth, Plaintiffs have asserted “to achieve elite status, Professional MMA Fighters train
 13 daily, making alternative simultaneous full-time employment nearly impossible.” Cons. Am.
 14 Compl. ¶ 94. Zuffa is entitled to information regarding the income Plaintiffs received outside of
 15 MMA to test the validity of that assertion.

16

17 ⁵⁴ Plaintiff Cung Le’s website clearly illustrates why information regarding non-MMA related
 18 compensation is necessary. The Official Cung Le Website, Biography, <http://cungle.com/bio/>
 19 (last accessed Jan. 20, 2016) (“In 2006, Le stepped into the mixed martial arts cage and showed
 20 the world that the loose MMA set of rules just meant more opportunities for him to work his
 21 magic. Virtually all his fights have ended in resounding victories by KO. With his remarkable
 22 skills in Taekwondo, Vietnamese Kung-fu, wrestling, Thai boxing, and Brazilian Jiu-Jitsu,
 23 combined with a rabid fan-base that grows exponentially with every appearance, Cung Le was a
 24 natural sponsorship choice for Throwdown Industries and Knoxx Gear. So it should come as no
 25 surprise that Hollywood has been knocking on Le’s door. After appearing in a couple of
 26 independent films and an episode of Walker – Texas Ranger, Le is now signed with Insomnia
 27 Entertainment and is awaiting the release of his first major feature film, Blizhniy Boy: The
 28 Ultimate Fighter, co-starring David Carradine, Eric Roberts, and Gary Busey.”)

⁵⁵ Plaintiffs’ Complaint defines “MMA” or “Mixed Martial Arts” as a sport in which
 “competitors use interdisciplinary forms of martial arts that include, *e.g.*, jiu-jitsu, judo, karate,
 boxing, kickboxing, taekwondo, and/or wrestling,” Cons. Am. Compl. ¶ 27(j). MMA does not
 refer to the individual sports, such as jiu-jitsu or boxing, that are limited to one of those
 disciplines. Collectively, these forms of martial arts are called “combat sports.” Plaintiffs’
 proposal, therefore, would exclude documents on all combat sports except MMA, and therefore
 exclude documents related to Plaintiffs’ participation in, for example, professional kickboxing.

1 Fifth, Zuffa is entitled to evaluate the degree to which Plaintiffs' other revenue
 2 opportunities were related to or enhanced by their experience and exposure in the UFC. For
 3 example, if a Plaintiff owns a gym whose membership and profitability is enhanced by his
 4 association with the UFC, this is relevant to their incentives to contract with Zuffa, and tends to
 5 rebut the allegation that these athletes have no choice but to contract with Zuffa.

6 Plaintiffs cite a number of horizontal price-fixing cases to suggest that this information is
 7 not relevant to their claim. These cases are irrelevant because, unlike here, in none of those cases
 8 was there a reasonable connection between the requested discovery and the allegations of the
 9 Complaint, i.e., a horizontal conspiracy to fix prices. Here, as explained above, the requested
 10 information bears directly on the allegations made by Plaintiffs. Further, while Plaintiffs wish to
 11 portray this as a simple "undercompensation" case, in light of the scope of their allegations that
 12 challenge a variety of practices that Zuffa believes are procompetitive, the extent to which Zuffa's
 13 alleged conduct benefitted rather than harmed the Plaintiffs will be a contested issue on which
 14 Zuffa is entitled to obtain evidence, including potentially to support expert economic analysis.

15 In addition, Plaintiffs' assertion that non-MMA related income is irrelevant is contradicted
 16 by their own third party subpoenas which contain Requests virtually identical to the one served by
 17 Zuffa to which Plaintiffs now object.⁵⁶ Certainly if Plaintiffs seek to get this information from
 18 third parties, Zuffa is entitled to obtain that information from the named Plaintiffs themselves.

19

20

21 56 *Compare* Zuffa RFP 15 ("DOCUMENTS sufficient to show all income YOU received from
 22 any source other than a PROMOTER since YOU became a Professional MMA fighter, including
 23 information showing the amount YOU received; the source of that income; the service rendered
 24 or property, whether tangible or intangible, delivered in exchange for any payment; the date on
 25 which the payment was received; and, for recurring payments, the frequency of such payments")
 26 to Plaintiffs' Subpoena to First Round Management RFP 11 ("Documents sufficient to show all
 27 income Your Clients or any other MMA Fighter received from any source other than a MMA
 28 Promoter since Your Clients or other MMA Fighters became a Professional MMA Fighter,
 including information showing the amount Your Clients or other MMA Fighters received; the
 source of that income; the service rendered or property, whether tangible or intangible, delivered
 in exchange for any payment; the date on which the payment was received; and, for recurring
 payments the frequency of such payments.")

1 Finally, Plaintiffs have requested much more substantial and invasive financial
 2 information from Zuffa. There is nothing disproportionate or burdensome about Zuffa's request
 3 to Plaintiffs.

4 **2. Plaintiffs' Position (Plaintiffs' Statement)**

5 Plaintiffs respectfully request that the Court reject Defendant's overbroad Requests for
 6 Production Nos. 2 and 15, demanding that Plaintiffs provide tax returns and other information
 7 regarding non-MMA-related income. Plaintiffs ask the court to require that Plaintiffs produce
 8 only responsive documents and information "sufficient to show their income from MMA events,
 9 as payments for bouts or other related services, and any sponsorship revenues they have received
 10 related to MMA fighting, including merchandising and other payments for use of their identities."

11 It is worth noting at the outset that Plaintiffs' proposal, outlined above, would include any
 12 relevant information sought by Defendant. Defendant states that "Plaintiffs have put at issue
 13 compensation they have earned from the use of their identity in MMA and elsewhere, for
 14 example, if Plaintiffs were compensated for an appearance in a movie or had a DVD workout
 15 video that used their name or likeness, including where the UFC name or brand may have been
 16 expressly used." Plaintiffs' proposal encompasses production of, among other things, documents
 17 showing "any sponsorship revenues they have received related to MMA fighting, including
 18 merchandising and other payments for use of their identities." Plaintiffs' proposal thus envisions
 19 the production of documents of the type Defendants seek relating to movie appearances, DVD
 20 workout videos, etc., so long as the opportunities came about at least in part as a result of
 21 Plaintiffs' MMA careers. Information regarding income *entirely* unrelated to Plaintiffs' MMA
 22 careers is simply irrelevant, and triggers substantial privacy concerns.

23 Plaintiffs allege that their *MMA-related income* was suppressed by Defendant's conduct,
 24 and documents regarding non-MMA-related income simply have no relevance to those
 25 allegations. Courts have consistently denied requests for financial information from antitrust
 26 plaintiffs where, as here, plaintiffs are not seeking lost profits beyond alleged overcharges (in the
 27 monopoly context) or underpayment (in the monopsony context). *See, e.g., In re Press Sensitive*
 28 *Labelstock Antitrust Litig.*, 226 F.R.D. 492, 496 (M.D. Pa. 2005) (rejecting defendants' effort to

1 compel plaintiffs' financial records in order to show certain plaintiffs might be "power buyers"
 2 who would have greater leverage or competitive ability to negotiate higher prices than fellow
 3 plaintiffs); *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 302 (D.D.C. 2000) (holding that
 4 plaintiffs' financial information is not relevant to "demand elasticity" and industry-wide, public
 5 data is sufficient to calculate but-for prices); *In Re Wirebound Boxes Antitrust Litig.*, 131 F.R.D.
 6 578, 578 (D. Minn. 1990) (denying defendant's motion to compel production of plaintiff's
 7 financial information where plaintiffs "do not and will not seek to recover lost profits," and the
 8 damages sought would be measured by "calculating the extent of unlawful overcharges imposed
 9 by defendants"); *In Re Folding Carton Antitrust Litig.*, No. MDL 250, 1978 U.S. Dist. LEXIS
 10 20409, 1978 WL 218424, at *7-8 (N.D. Ill. May 5, 1978) (holding plaintiff's financial data
 11 irrelevant to the issue of whether defendants conspired to fix prices, stating that "[i]f plaintiffs are
 12 entitled to recover for an overcharge, they will do so regardless of whether their profits decreased
 13 or increased during the period of the conspiracy."). In sum, the case law overwhelmingly supports
 14 Plaintiffs' position that if they are entitled to recover for under-compensation with regard to their
 15 MMA-related income, they will do so regardless of their income from entirely unrelated sources.

16 Zuffa's arguments in favor of this overbroad discovery are unpersuasive. As to
 17 Defendant's first justification for these documents, Defendant does *not* claim that non-MMA-
 18 related compensation generated from Plaintiffs' identity rights licensing would be relevant for
 19 challenging Plaintiffs' allegations regarding the *terms* of Defendant's anticompetitive contracts.
 20 Rather, their request amounts to a fishing expedition for indirect indications of how Plaintiffs may
 21 or may not have *interpreted* those terms.

22 Second, Defendant claims that Plaintiffs' non-MMA-related income is relevant for
 23 evaluating Plaintiffs' comparisons of their compensation to those of athletes make in major team
 24 sports leagues such as the NBA. But Plaintiffs' Complaint, as cited by Defendant, only refers to
 25 fighter or player compensation as a *percentage of revenue generated from an individual bout*, or
 26 as a percentage of revenue generated by a particular league, and is thus entirely circumscribed
 27 within sports-related revenue. *See* Cons. Am. Compl. ¶¶ 19, 103-4. Defendant simply offers no

1 support for why the sports-related incomes of other athletes should be compared to *all* sources of
 2 Plaintiffs' income.

3 Third, Defendant claims that Plaintiffs' non-MMA-related income is relevant to why
 4 contracts extended beyond their original stated term. Again, as discussed above, Plaintiffs'
 5 interpretation of Defendant's contract terms are not relevant here. It is the contract terms
 6 themselves, as part of a larger anticompetitive scheme, that is relevant.

7 Fourth, Defendant claims documents sufficient to show Plaintiffs' non-MMA-related
 8 income are relevant for market definition. But Defendant misunderstands the law. The relevant
 9 markets in this case – whether the market for the promotion of elite MMA events or the market
 10 for elite MMA fighter services – cannot be challenged as proper markets based on Plaintiffs' non-
 11 MMA-related income since evidence of the former will turn on *promoter* pricing and evidence of
 12 the latter on what fighters could charge other promoters for their services. And Plaintiffs have
 13 agreed to produce documents sufficient to show such MMA-related income.

14 Finally, Defendant's fifth and sixth justifications – that Plaintiffs' non-MMA-related
 15 income is relevant to test their ability to engage in other full-time employment and their
 16 incentives for signing contracts with Defendant – have no bearing on Plaintiffs' claims pertaining
 17 to Defendant's anti-competitive conduct in the market for elite MMA fighter services. Plaintiffs
 18 have alleged that Defendant's market power distorts competition in the relevant markets, and
 19 Plaintiffs' non-MMA-related income sources would have no bearing on whether the UFC in fact
 20 unlawfully acquired and maintained its monopoly and monopsony power in the relevant markets.

21 **E. Plaintiffs' Production of Medical Records or Drug Test Results Relating to
 22 Suspensions or Tolling**

23 **1. Zuffa's Statement**

24 The parties have a remaining dispute about Zuffa's Requests for Production 19 and 20
 25 which call for "All DOCUMENTS showing any medical or disciplinary suspensions" the
 26 Plaintiffs received and documents sufficient to show "any extensions to or tolling of" Plaintiffs'
 27
 28

1 contracts “and the reason for the tolling or extension.” The parties’ dispute concerns whether
 2 Plaintiffs must provide medical records and drug test results in response to these Requests.⁵⁷

3 To be clear, Zuffa is not seeking an unlimited production of Plaintiffs’ medical records or
 4 drug test results. Rather, its Requests are narrowly tailored to seek such documents only to the
 5 extent that a specific medical injury or drug test result was the reason a Plaintiff’s contract was
 6 extended or tolled (whether formally or informally). Responsive documents are relevant and
 7 necessary for a number of reasons.

8 Plaintiffs contend that Zuffa has manipulated the provisions of its agreements with
 9 Plaintiffs that provide for tolling or extension due to injury or suspension to improperly extend
 10 the agreements, and that through these provisions, and others, Zuffa can extend an athlete’s
 11 agreement “all but indefinitely.” Cons. Am. Compl. ¶ 113(g); *see generally* ¶¶ 9, 113(a). Where
 12 Plaintiffs’ claims put medical records at issue, such as here, courts have permitted discovery from
 13 the named plaintiffs into such records. *See In re National Hockey League Players’ Concussion*
Injury Litigation, No. 14-2551, 2015 WL 1191272, at *5 (D. Minn. Mar. 16, 2015) (ordering the
 14 named plaintiffs to produce medical records in a concussion-related lawsuit not just of treatment
 15 to the head or brain but also other medical records or treatment which the court found may also be
 16 relevant); *see also In re Gerber Probiotic Sales Practices Litig.*, 306 F.R.D. 527, 528-29 (D.N.J.
 17 2015). Zuffa is entitled to challenge Plaintiffs’ allegation by showing, among other things, both
 18 the legitimate purpose of the challenged provisions and that Plaintiffs’ contract terms were
 19 extended or tolled due to genuine medical or disciplinary reasons, including those arising out of
 20 drug testing. These documents are necessary for Zuffa to show that such short-term extensions or
 21 tolling are necessary in order for Zuffa to have the opportunity to promote bouts for fighters when
 22 they are healthy and to gain the benefit of its bargain under the contract.

23 This is not an abstract issue. After the Complaint was filed, one of the named Plaintiffs
 24 specifically accused Zuffa of mishandling his drug test results and engaging in other bad faith

25
 26
 27 ⁵⁷ Zuffa proposes that responsive documents not previously disclosed publicly will be marked
 28 and treated as “Confidential” or “Highly Confidential” under the Protective Order. *See* IV.F.3.
 Plaintiffs disagree that any “Highly Confidential” designation should be given to such documents.

1 activities to improperly extend his contract and/or to prevent him from engaging in other
 2 competitive activities. Mar. 24, 2015 Letter from S. Le to L. Epstein of Zuffa.⁵⁸

3 Relatedly, whether there are claims and defenses that are unique to a proposed class
 4 representative is relevant to class certification, including predominance, adequacy and typicality.
 5 *Carr v. Int'l Game Tech.*, No. 3:09-CV-00584-ECR, 2012 WL 909437, at *6 (D. Nev. Mar. 16,
 6 2012); *accord Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). For example,
 7 Zuffa partnered with the United States Anti-Doping Agency (USADA) to institute what it
 8 believes to be one of the strongest drug testing policy in organized sports. Most of the putative
 9 class members who compete in the UFC support this policy in order to further legitimize the sport
 10 and ensure that athletes are competing on a level playing field.⁵⁹ To the extent that the proposed
 11 named class representatives have been disciplined or suspended for performance-enhancing drug
 12 use, or been suspended for it, this presents not only unique claims and defenses, it may also pose
 13 significant class conflicts with other members of the putative class who support this policy and
 14 choose to compete fairly.

15 In light of the relevance of these documents, these documents should be produced.

16 **2. Plaintiffs' Position (Plaintiffs' Statement)**

17 Defendant has insisted that Plaintiffs produce sensitive documents that have no relevance
 18 to any claim or defense, and are otherwise protected by the United States and California
 19

20 ⁵⁸ As another example, named Plaintiff Jon Fitch recently failed a drug test while under contract
 21 with a competing promotion, the World Series of Fighting, and public sources indicate that he
 22 was suspended by the California State Athletic Commission for 9 months. *Shawn Al-Shatti, Jon*
Fitch flunks WSOF 16 drug test, suspended nine months,
<http://www.mmafighting.com/2015/2/6/7994089/jon-fitch-flunks-wsof-16-drug-test-suspended-nine-months> (last accessed Jan. 20, 2016). Zuffa is entitled to documents to see whether or not
 23 the term of his agreement with the World Series of Fighting was tolled during the period of his
 24 suspension or extended beyond the suspension and the reasons for that action – an action the
 25 Complaint alleges is anticompetitive if done by Zuffa. Cons. Am. Compl. ¶ 113(g).

26 ⁵⁹ One of the interim class counsel, Rob Maysey, has also publicly criticized Zuffa's
 27 implementation of its anti-doping policy, an opinion that is not shared by many fighters.
 September 17, 2015 Tweet by Rob Maysey's @MMAFA Twitter Account: "Don't rely on
 28 promoters – take control of your sport. Did you have any input into that USADA policy? AC
 policies? No."

1 Constitutions as well as other applicable provisions of the privacy laws of Nevada or the states in
 2 which Plaintiffs reside.

3 First, Defendant's Request for Production No. 19 seeks production of "All DOCUMENTS
 4 showing any medical or disciplinary suspension" any Named Plaintiff received "in any
 5 professional or amateur sport or any other circumstances that prevented [him] from participating
 6 for any period of time as an ATHLETE." Nothing on the face of the Request supports Zuffa's
 7 demand for Plaintiffs' production of their "individual medical records and drug test results." The
 8 Request is clearly qualified by the existence of a suspension or disciplinary action. Nor did
 9 Defendant initially expand this Request in its December 18, 2015 correspondence with Plaintiff
 10 clarifying the scope of this Request. Now, Defendant is insisting on receipt of Plaintiffs' private
 11 medical information and drug test results—without even attempting to tie the request to Plaintiffs'
 12 MMA careers. Medical records and drug test results—of any type—have no relevance to any
 13 claim or defense in this case. To the extent there is any tangential relevance of such sensitive
 14 documents, Ninth Circuit case law nonetheless precludes Defendant from obtaining such private
 15 information. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35, n. 21 (1984) (noting that
 16 "[a]lthough [Rule 26(b)(2)] contains no specific reference to privacy or to other rights or interests
 17 that may be implicated, such matters are implicit in the broad purpose and language of the Rule");
 18 *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing a limited privacy interest in the
 19 confidentiality of one's medical records derived from the U.S. Constitution); *Breed v. U.S. District Court*, 542 F.2d 114, 116 (9th Cir. 1976) (recognizing a constitutionally-based right of
 20 privacy that can be raised in response to discovery requests).

22 The Ninth Circuit has recognized that "[i]ndividuals have a constitutionally protected
 23 interest in avoiding disclosure of personal matters, including medical information." *Tucson
 24 Woman's Clinic v. Eden*, 379 F.3d, 531, 551 (9th Cir. 2004).⁶⁰ To evaluate a privacy objection,

26 ⁶⁰ See also *Bloodsaw v. Lawrence Livermore Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998)
 27 (constitutional right of privacy "clearly encompasses medical information and its
 28 confidentiality"); *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) (Due Process Clause
 29 protects right of privacy of personal medical information and records); *Caesar v. Mountanos*, 543

1 courts must balance the party's need for the particular information against the privacy right
 2 asserted. *Breed*, 542 F.2d at 1116. Given the lack of relevance of Plaintiffs' medical records and
 3 drug testing results to any claims or defenses in this case, Defendant's request should not trump
 4 Plaintiffs' protected privacy interests. *Hardie v. NCAA*, No. 13-cv-346-GPC, 2013 U.S. Dist.
 5 LEXIS 165312, at *10 (N.D. Cal. 2013) (distinguishing privacy interests at stake "in names,
 6 addresses and phone numbers from 'those more intimate privacy interests such as compelled
 7 disclosure of medical records and personal histories'" (quoting *Artis v. Deere & Co.*, 276 F.R.D.
 8 348, 353 (N.D. Cal. 2011)).

9 Defendant's Request for Production No. 20 seeks production of documents "sufficient to
 10 show any extensions to or tolling of the term of" Plaintiffs' agreements with any promoter,
 11 "including the duration and the reason for the tolling or extension." In Plaintiffs' initial responses
 12 to this Request, they agreed to "produce all agreements within [Plaintiffs'] possession, custody or
 13 control governing their professional MMA fights, including any extensions to such agreements,"
 14 and in a letter from Plaintiffs' counsel to Defendant's counsel dated January 15, 2016, agreed to
 15 extend those responses to include all professional combat sports. To the extent Defendant's
 16 disagreement with that response is based on a demand for medical records or drug test results
 17 under the strained assumption that medical or drug-related reasons would be "the reason for the
 18 tolling or extension," Defendant's position is both conclusory and improper as seeking protected
 19 information.

20 Defendant states that Plaintiffs contend that Defendant has manipulated extensions or
 21 tolling to extend its contracts "all but indefinitely," citing paragraph 9 of the Consolidated
 22 Amended Complaint. *But that paragraph does not even mention tolling or extensions of
 23 contracts, nor does it accuse Defendant of manipulating tolling or extensions.*⁶¹ Moreover, even

24
 25 F.2d 1064, 1067, n.9 (9th Cir. 1976) (right to privacy encompasses the doctor-patient
 26 relationship); *Pagano v. Oroville Hosp.*, 145 F.R.D. 683, 695 (E.D. Cal. 1993) (the privacy
 27 interest in medical records is derived from Article 1, Section 1 of the California Constitution);
 28 California Constitution, Art. I, sec. 1.

61 That paragraph does allege that Defendant "forc[ed] all UFC Fighters, if they want to engage
 in professional MMA fights at the elite level, to enter into contracts that bar them from working

1 if the CAC alleged what Defendant claims it alleged, that would not put Plaintiffs' confidential
 2 medical records at issue.

3 The cases Defendant cites, such as the unpublished decision in *In re National Hockey*
 4 *League Players' Concussion Injury Litigation*, No. 14-2551, 2015 WL 1191272 (D. Minn. Mar.
 5 16, 2015), squarely involve plaintiffs' medical conditions, and thus put plaintiffs' medical records
 6 at issue. This, conversely, is an antitrust case, alleging monopolistic and monopsonistic conduct
 7 by the dominant MMA promoter, Zuffa.⁶² It has nothing to do with plaintiffs' medical records,
 8 nor with the private medical records of hundreds of absent class members. Defendant's attempts
 9 to inject Plaintiffs' and class members' private medical information into this case are, quite
 10 simply, an effort to impugn the character of Plaintiffs and class members who may have tested
 11 positive for performance-enhancing drugs. Plaintiffs' private medical records, and those of absent
 12 class members, are irrelevant to this case, and even if they had some marginal relevance, which
 13 they do not, that relevance would be outweighed by the privacy concerns illustrated by the
 14 important privacy concerns implicated by confidential medical records.

15 Defendant's suggestion of a purported "conflict" between Plaintiffs who may have had a
 16 positive drug test and class members who support drug testing for MMA fighters strains credulity.
 17 Plaintiffs do not challenge Defendant's drug-testing policy in this case; it is not even mentioned
 18 in the CAC. That one of the Plaintiffs may have had an unrelated dispute with Defendant about
 19 drug testing results has absolutely nothing to do with this action.

20 Finally, if Defendant extended or tolled a Plaintiff's contract for medical or disciplinary
 21 reasons, Defendant already has the information it relied upon in doing so. There is simply no
 22 reason for Plaintiffs to produce such sensitive, confidential documents.

23
 24
 25 with would-be rival MMA Promotion companies all but indefinitely." Cons. Am. Compl. ¶ 9. But
 26 it says nothing about tolling or extensions of contracts, much less Defendant's manipulation of
 27 tolling or extensions.
 28 ⁶² Notably, Defendant fails to cite any antitrust cases in which plaintiffs were compelled to
 produce their private medical records.

F. Protective Order

1. Joint Statement

3 Both Parties have served discovery requests on third parties, many of whom have
4 conditioned their production of responsive documents on the availability of a “HIGHLY
5 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” (“AEO”) designation. The Parties agree that
6 allowing third parties to restrict access to documents containing their confidential or highly
7 sensitive commercial or financial information or trade secrets to outside counsel makes sense.
8 The third parties include other MMA promoters, fighter agents, venues, broadcasters, sponsors,
9 and media outlets. Many of these third parties are understandably reluctant to share their sensitive
10 commercial or financial information with Zuffa, including its in-house counsel, or with the
11 fighters. For example, sponsors may be reluctant to share contracts or financial information,
12 which could give the UFC negotiating leverage over the sponsors. Or agents may be reluctant to
13 allow the Plaintiffs to see the details of the agents’ contracts with other fighters, or agreements the
14 agents may have with sponsors, promoters, etc. Plaintiffs and Defendant agree that third parties
15 should be able to affix an AEO designation to their sensitive or confidential business information
16 so that only outside counsel—not the parties or their executives, employees or in-house counsel—
17 can see these documents. The parties disagree about whether an additional revision is required as
18 explained below. The parties attach their respective Proposed Orders as Attachment C (Plaintiffs)
19 and Attachment D (Zuffa).

2. Plaintiffs' Statement

21 The parties have exchanged several drafts of a revised protective order that includes an
22 AEO provision for third parties. In its original draft of the revised protective order, Zuffa included
23 the following language in section 2.8, which both sides were happy with:

25 HIGHLY CONFIDENTIAL—Attorneys' Eyes Only Information or Items: a Non-
26 Party's extremely sensitive, highly confidential, non-public information, consisting
27 either of trade secrets or other highly confidential information directly concerning
business plans, strategies, revenues or costs, disclosure of which to a Party or
another Non Party would create a substantial risk of significant competitive or
business injury to the Designating Non-Party that could not be avoided by less
restrictive means.

1 However, in Zuffa's draft dated January 14, 2016, it included language in section 2.4
 2 which adds a provision for the *parties* to designate documents as AEO, to which the Plaintiffs are
 3 opposed:

4 Designating Party: a Party that designates information or items that it produces in
 5 disclosures or in responses to discovery as "CONFIDENTIAL" *or a Party that*
designates information or documents of a medical or highly personal nature, from
the files of athletes who are not named as Plaintiffs in this action, as "HIGHLY
CONFIDENTIAL-ATTORNEYS' EYES ONLY" (italics signify the newly added
 7 language).

8 This Court has already ruled on this issue, in a Status Conference held on September 30,
 9 2015. In its Minutes of Proceedings this court ordered that "Defense Counsel have not met their
 10 burden of establishing the need for the highly confidential 'attorneys eyes only' designation in this
 11 case, and the Court will adopt the proposed form of Protective Order without that designation."
 12 Dkt 190. Nothing has changed that requires the Court to reach a different conclusion on this issue.

13 Zuffa has defended its position on the basis that some documents included in its fighter
 14 contract files contain "medical and other sensitive non-public information relating to the
 15 extensions and tolling of certain fighters' contracts." As an initial matter, there is no connection
 16 between Plaintiffs' allegations that Zuffa selectively invoked contract extensions in order to keep
 17 fighters from competitors, and their medical records, or other sensitive information. Plaintiffs are
 18 not putting at issue every single reason a contract could be extended—the contractual provisions
 19 at issue are simply an example of Zuffa's anticompetitive conduct, locking fighters into contracts
 20 that were automatically renewed at Zuffa's sole election. *See* Cons. Am. Compl. ¶ 113(g)
 21 ("Tolling provisions ... extend the term of the UFC Fighter's contract during periods when he or
 22 she is injured, retired, or otherwise declines to compete, thus virtually prohibiting even
 23 disgruntled athletes from sitting out the term and signing with a would be rival promoter").
 24 Nothing in Plaintiffs' allegations relates to whatever subjective reason Zuffa had for extending a
 25 fighter contract, or exercising a tolling provision.

26 Zuffa asserts that "[t]hese documents are clearly relevant to Plaintiffs' allegations and
 27 Zuffa's defenses because Plaintiffs' Complaint accuses Zuffa of manipulating tolling and various
 28 other 'extension clauses' to improperly extend the length of its agreements with fighters." This

1 misstates Plaintiffs' position, which is that the various contract tolling and extension clauses were
 2 part of Zuffa's overarching scheme to suppress fighter compensation. Plaintiffs do not seek to
 3 contest each specific instance where a tolling provision may or may not have been invoked, and
 4 they certainly do not seek to contest the individual bases (that is, the medical records) on which
 5 Zuffa may or may not have invoked a tolling provision. These records are not relevant to
 6 Plaintiffs' allegations, they are not relevant to Plaintiffs' damages calculation (this case is not
 7 about individual enforcement of contract clauses, it is about an overarching scheme that includes
 8 contract clauses among other factors), they are simply irrelevant to any claim or defense raised in
 9 this litigation.

10 Zuffa claims these records are responsive to Requests for Production 22 and 23, submitted
 11 by Plaintiffs to Zuffa. These RFPs seek documents pertaining to the contracts themselves, not
 12 incidental information about fighters' medical conditions. For example, RFP 22 seeks "All
 13 Document referencing or relating to the drafting or editing of, justification for, and the reasoning
 14 behind" various contract provisions. Reading that to be a request for medical records simply
 15 makes no sense. Similarly, RFP 21 seeks the contracts themselves, communications and
 16 negotiations with the fighters or their agents, and internal and external documents relating to the
 17 agreements or negotiations. Again, no mention of medical records, personnel files, or any other
 18 sensitive information about the fighters. Individual medical records are not contracts, nor do they
 19 relate to them, which is why Plaintiffs have not sought these records.

20 Plaintiffs' position is further supported by the fact that Zuffa seeks the "AEO" designation
 21 for documents which Plaintiffs have *neither requested nor sought protection for*. Plaintiffs have
 22 informed Zuffa that medical tests and drug tests are not responsive, and they do not seek them in
 23 any Request, as they are not relevant to any claim or defense raised in this litigation.
 24 Discussion of revising the Protective Order only came up because third parties have asked for an
 25 AEO provision. Defendant has seized on this opening and is trying push through its own AEO
 26 provision—which has already been rejected once by this Court. Plaintiffs ask that the Court stand
 27 by its prior opinion and deny Defendant's attempt to insert an AEO provision for the parties.
 28 Plaintiffs further ask that the Court approve a revised version of the Protective Order, which does

1 contain a “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” provision for non-
 2 parties only, which Plaintiffs have attached hereto as Attachment C.

3 **3. Zuffa’s Statement**

4 In addition to the agreed-upon revision, Zuffa requests the Court permit a “Highly
 5 Confidential—Attorneys’ Eyes Only” designation to a narrow set of documents consisting of:
 6 “documents or information of a medical or highly personal nature, from the files of athletes who
 7 are not named as Plaintiffs in this action.” Attachment D, Zuffa’s Proposed Revised Protective
 8 Order ¶ 2.8.

9 The reason for this provision is as follows. In reviewing the fighter contract files for
 10 documents responsive to Plaintiffs’ Requests, Zuffa has come across documents containing
 11 medical and other sensitive personal information relating to the extensions and tolling of certain
 12 fighters’ contracts. These documents are clearly relevant to Plaintiffs’ allegations and Zuffa’s
 13 defenses because Plaintiffs’ Complaint accuses Zuffa of manipulating tolling and various other
 14 “extension clauses” to improperly extend the length of its agreements with fighters. Cons. Am.
 15 Compl. ¶ 113(a) (“Regardless of the term of the agreement, the [exclusivity] provision includes
 16 various termination and extension clauses that can be triggered at the UFC’s sole discretion,
 17 thereby effectively extending the exclusivity provisions indefinitely”); ¶ 113(g) (regarding tolling
 18 provisions). Zuffa intends to produce documents from the contract files that reflect the reasons
 19 for the extensions. These documents are in the contract files because they relate to extensions.
 20 Subject to specific issues that may arise, Zuffa does not intend to collect or produce other medical
 21 records, which are stored in different files.

22 Zuffa requests the option to designate such information as “Highly Confidential” because
 23 the Plaintiffs, to the extent they still compete, are actual or potential competitors to other fighters
 24 in MMA and other combat sports bouts. To be clear, this “Highly Confidential” designation
 25 would not apply to any of Zuffa’s corporate documents, but only to those medical records or other
 26 documents of a highly personal nature relating to an athlete. The “Highly Confidential”
 27 designation would only prevent the opposing party from viewing such documents. The parties’
 28 counsel of record would have full access to documents produced with this designation.

1 Plaintiffs justify their resistance to a higher level of protection for the putative class
 2 members' sensitive information on the grounds that Plaintiffs do not view these documents as
 3 relevant.⁶³ This position should be rejected. Plaintiffs' position is essentially a motion in limine
 4 to exclude the production and introduction of these documents into evidence. It is far too early in
 5 the case for the Court to decide this issue. This is particularly true given (1) these documents'
 6 close relation to the allegations in Plaintiffs' Complaint, as discussed above, and (2) their clear
 7 responsiveness to Plaintiffs' Requests for Production, Dkt. 107-1, *e.g.*, RFP 21 (requesting all
 8 documents relating to any agreements or contracts between Zuffa and MMA fighters); RFP 22
 9 (requesting all documents referencing or relating to any clauses granting Zuffa the right to extend
 10 the term of an MMA fighter's contract). These documents show both the purpose and operation
 11 of the extension and tolling provisions and Zuffa's good faith in applying them. Plaintiffs'
 12 argument that they do not want to receive these documents or that they are not called for by the
 13 RFPs amount to little more than an argument that they are not interested in responsive documents
 14 relating to challenged contract terms that support Zuffa's defenses.

15 In order to balance Zuffa's need to produce and introduce documents to support its
 16 defense while balancing the privacy interests of the athletes involved, Zuffa submits that a
 17 designation of "Highly Confidential" for this narrow class of documents is the appropriate
 18 solution. This issue was not considered or addressed in the parties' earlier submissions regarding
 19 the Protective Order or this Court's earlier Order.

20

21 Dated: January 22, 2016

BOIES, SCHILLER & FLEXNER LLP

22

23

By: /s/ John F. Cove, Jr.

John F. Cove, Jr.

24

Attorneys for Defendant Zuffa, LLC, d/b/a
 Ultimate Fighting Championship and UFC

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63 Plaintiffs' argument is even more confounding given their citation to numerous cases discussing the importance of privacy interests involved in such medical records. *See* IV.E.2.

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1 Dated: January 22, 2016

Respectfully Submitted,

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ATTESTATION OF FILER

The signatories to this document are myself and Michael Dell'Angelo, and I have obtained Mr. Dell'Angelo's concurrence to file this document on his behalf.

Dated: January 22, 2016

By: /s/ John F. Cove, Jr.

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CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that service of the foregoing **Joint Status Report** was
3 served on January 22, 2016 via the Court's CM/ECF electronic filing system addressed to all
4 parties on the e-service list.

/s/ Suzanne E. Jaffe

Suzanne E. Jaffe